

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

No. 75-6119

75-6119

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE TITLE GUARANTEE COMPANY, a Sub-
sidiary of PIONEER NATIONAL TITLE
INSURANCE COMPANY, a Subsidiary of
TITLE INSURANCE AND TRUST COMPANY,
a Subsidiary of THE TI CORPORATION
(OF CALIFORNIA),

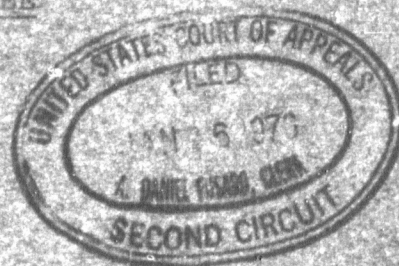
Plaintiff-Appellee,

-v-

NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-APPELLEE



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No. 75-6119

BRIEF FOR PLAINTIFF-APPELLEE

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-v-

NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellant.

No. 75-6119

BRIEF FOR PLAINTIFF-APPELLEE

Plaintiff-Appellee, THE TITLE GUARANTEE COMPANY, etc.
(hereinafter "Title Guarantee" or "the Company"), submits this
brief in opposition to the appeal of the Defendant-Appellant,
NATIONAL LABOR RELATIONS BOARD (hereinafter "the Board" or
"N.L.R.B."), and for affirmance of the District Court's Order
entered in the above matter on October 10, 1975 (A.64-76) 1/

1/References to the Appendix filed herein are indicated by the
designation "A", followed by a page number.

The District Court reaffirmed its October 10 Order by Order
dated November 28, 1975, denying the Board's motion for a stay
pending appeal to this Court (A. 95-100).

All dates referred to are in 1975, unless otherwise specified.

COUNTERSTATEMENT OF THE ISSUES

1. Whether the District Court properly concluded that N.L.R.B. investigative statements sought by Title Guarantee prior to a Board unfair labor practice hearing on a charge against the Company were not exempt from disclosure under exemption 5, and in the circumstances of this case, exemption 7(A), (C) or (D), of the Freedom of Information Act, as amended, 5 U.S.C. §552(b) (5),(7) (A),(C),(D) (1974).

2. Whether, following its decision on the merits of Title Guarantee's Freedom of Information Act claim, the District Court did not abuse its discretion by directing the Board to produce the statements forthwith, or stay the conduct of its administrative hearing.

The Company maintains that these questions should be answered in the affirmative.

COUNTERSTATEMENT OF THE CASE

This case arose out of Title Guarantee's attempts to obtain, prior to a Board administrative hearing, certain statements received by N.L.R.B. agents in support of and during the investigation of an unfair labor practice charge against the Company (A.65). 2 / The Board refused to provide the statements under its regulations, 29 C.F.R. §102.117 (1975). Ultimately, the Company filed an action under the Freedom of Information Act, as amended (hereinafter "the Act" or "F.O.I.A."), 5 U.S.C. §552(a)(4)(B) (1974). (Ibid.)

The Board defended its withholding on the grounds that the statements sought were exempt from disclosure under certain specified exemptions to the Act, 3 / and moved to dismiss the complaint, or in the alternative, for summary judgment. Title Guarantee cross-moved for summary judgment in its favor. Following oral argument on the respective motions, 4 / the Court directed that the subject statements be submitted for an in camera inspection. 5 /

2 /The final amended charge, and the Board's administrative complaint alleged only a violation of §8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(5) (A.14,18). The complaint did not allege a violation of §8(a)(3) of that Act, 29 U.S.C. §158(a)(3), as might have been suggested by the District Court's Opinion (A.65).

3 /5 U.S.C. §552(b)(5), 7(A), (C), (D).

4 /A stenographic transcript was made of the argument (A.43-63).

5 /Such a procedure is specifically authorized by the Act. 5 U.S.C. §552(a)(4)(B).

On October 10, the Court issued its Opinion and Order from which the Board appeals (A. 64-76). 6/ Rejecting each of the arguments against disclosure, the Court denied the Board's motion (A. 76). It granted the Company's cross-motion "to the extent that the Board is directed to turn over the material sought by the plaintiff for inspection and copying forthwith." (Ibid.) The Court further concluded that, while immediate compliance with its Order would adequately meet the needs of Title Guarantee with respect to the administrative hearings, "the nature of an unfair labor practice hearing is such that plaintiff will be irreparably harmed if the material is not disclosed prior to those hearings." (Ibid.) Accordingly, it ordered that:

"...should the material not be made available to Title Guarantee in advance of the administrative hearings, the Board is enjoined from conducting any hearings in this matter until such time as it complies with this decision."

(Ibid.)

The Board refused to comply with this disclosure mandate. Instead, it postponed sua sponte and without date its unfair labor practice hearing (A. 77), and appealed. At the same time, it moved before the District Court for a stay pending

6/The parties were notified orally of the Court's determination on October 8. The Board's Notice of Appeal was filed October 22, 1975 (A.2).

appeal of the Court's October 10 Order. (A.78). 7 / Title Guarantee opposed this motion (A.84). On November 23, the District Court denied the Board's motion (A.95-100). It refused to stay its Order prohibiting the Board from conducting an unfair labor practice hearing without first providing Title Guarantee with the statements sought, 8 / observing, inter alia:

"Had the N.L.R.B. complied with this Court's original order there would have been no need for a postponement of the Board proceedings. The N.L.R.B. has chosen, however, not to comply with the disclosure order and seeks to continue its administrative proceedings without giving the plaintiff the benefit of review of material which this court has determined it is entitled to under the Act. 'With the express vesting of equitable jurisdiction in the District Court by...[the Act],' Re-negotiation Board v. Bannerkraft Clothing Co., [415 U.S.], at 20 [1974], this court will utilize its inherent powers as an equity court, cf., id., to bar such obviously inequitable procedures."

(A.97-98). 9 /

Dissatisfied with the District Court's refusal to permit it to proceed with its unfair labor practice hearing while the appeal progressed, the Board again sought a stay before this Court. That motion was denied on January 13, 1976.

Title Guarantee submits this brief in opposition to the Board's appeal and in support of the District Court's Opinion and Order.

7 / See, F.R. App.P. Rule 8. The Board in fact sought a stay of a stay, the effect of which would permit the Board's unfair labor practice hearing to go forward without complying with the disclosure of statements ordered by the Court.

8 / A.97-99.

9 / In oral argument on the motion for summary judgment, counsel for Title Guarantee stated that the company sought the statements prior to the Board hearing, and did not seek to postpone that hearing (A.63).

POINT 1

THE BOARD'S INVESTIGATIVE STATEMENTS ARE
NOT EXEMPT FROM DISCLOSURE UNDER THE
PROVISIONS OF AMENDED EXEMPTION 7

The Board maintains that the investigative statements sought are exempt under the provisions of amended exemption 7. Exemption 7, in material part, presently permits withholding of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would

- (A) interfere with enforcement proceedings, ***
- (C) constitute an unwarranted invasion of personal privacy, *** [or]
- (D) disclose the identity of a confidential source... ***"

5 U.S.C. §552(b)(7)(A), (C), (D) (1974).

The District Court reviewed the law under the original exemption and the legislative history of amended §552(b)(7). (A.72-73). It found that under the original exemption, "virtually any material compiled in the course of an investigation [c]ould be withheld from disclosure." (A.72). However, it also found that the 1974 amendments were designed "to limit the exemptions to instances where disclosure would interfere with one of specific set of interests." (A. 72). The Court observed that the Board had the burden of demonstrating such harm, and that the burden had not been satisfied in this case (A. 97). Accordingly, it directed disclosure (A. 76).

We believe that the District Court was correct. A review of the legislative history of the original and amended Acts, which we discuss next, supports this view.

A. The Legislative History Of The Original Exemption 7 (1967)

1. Senate Bill 1666 of 1964.

As proposed in Senate Bill 1666(1964), exemption 7 would have applied to:

"investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein."

Proposed § 3(c)(7). The Senate Report on this proposal explained:

"It was believed that most agencies had statutory authorization for withholding investigatory files. However, this proved to be incorrect, and even such agencies as the FBI did not possess such authority. The exemption covers investigatory files in general, but is limited in time of application."

S. Rept. No. 1219, 88th Cong., 2d Sess., at 14 (1964); see also, id., at 7. (emphasis added).

During Senate consideration of this proposal, Senator Humphrey offered an additional exemption (8) which would have substantially altered proposed exemption 7. It excluded:

"Statements of agency witnesses until such witnesses are called to testify in an action or proceeding and request is timely made by a private party for the production of relevant parts of such statements for purposes of cross examination."

110 Cong. Rec. 17667 (1964), F.O.I.A. Source Book, at 110. 10/

Senator Humphrey explained:

Clause (7) of the amended section (3) would appear to open up investigatory files to an extent that goes beyond anything required by the courts, including the decision of the Supreme Court in the Jencks case. This clause for example, which provides for disclosure of investigatory files as soon as they "affect an action or proceeding or a private party's effective participation therein" is susceptible to the interpretation that once a complaint of unfair labor practice is filed by the General Counsel of the NLRB, access could be had to the statements of all witnesses, whether or not these statements are relied upon to support the complaint.

The Senator continued:

Witnesses would be loath to give statements if they knew that their statements were going to be made known to the parties before the hearing. While witnesses would continue to be protected in testifying at the hearing, they would enjoy no protection prior to that time. 11/ Substantial litigation would be required before the full scope and effects of clause (7) would be clear.

A pending draft report of the ABA Committee on Board Practice and Procedure states that:

In the consideration of section 102.118 of the Board's rules by last year's Committee on Board Practice and Procedure there was considerable opposition in any rule which would permit a party to engage in a fishing expedition into the Board's investigation files. It was felt that the opening of the Board's files to inspection would seriously handicap the Board in the investigation of charges.

10 /Comm. Print, "Freedom of Information Act Source Book: Legislative Materials, Cases, Articles," Subcomm. On Admin. Pract. & Proc. of the Comm. on the Judiciary, United States Senate, 93d Cong., 2d Sess. (1974) (hereinafter "Source Book").

11 /But see, p. 44, infra.

The committee concluded that the Board's investigatory files should be exempt from disclosure. The Board would, of course, like all other administrative agencies of the Government, continue to be governed by the rules laid down by the U.S. Supreme Court in the Jencks case. 12/

Mr. President, I have cited these proposals and I would welcome comment from the able chairman of the committee.

Id., at 17667, Source Book, supra, at 110-111. Senator Long agreed to the substance of the Humphrey proposal, but suggested that instead of having two exemptions, exemption 7 should be modified. He replied:

"The last two suggestions relate to investigatory files and an inclusion in the bill of the substance of the Jencks rule. I believe that this is a valuable suggestion but I would suggest as a substitute for the Senator's proposals that we combine them and restate exception (7) as a new proposal which would read as follows: "investigatory files compiled for law enforcement purposes except to the extent they are by law available to a private party."

110 Cong. Rec. 17668, Source Book, supra, at 111. This amendment was adopted. Ibid., Source Book, supra, at 111-112.

12/The report referred to by Senator Humphrey is contained in Section of Labor Relations Law, American Bar Ass'n: 1964 Proceedings, at 317 (Report of the Committee on NLRB Practice and Procedure) (1965). Interestingly, the Committee's Report in the 1963 Proceedings (1964), dealing with the Board's "Jencks Rule" (29 C.F.R. §102.118), noted only that "certain Committee members" were fearful of "fishing expeditions" resulting from any disclosure policy broader than Jencks. Id., at 105.

2. Senate Bill 1160 of 1965

Despite Congress' solicitude for the protection of Board investigative files, the N.L.R.B. was still dissatisfied with the proposed exemption. Specifically, it objected to the phrase in S. 1666, "to the extent they are by law available to a private party." The Board was concerned that even this expression "could well encompass the discovery procedures of the Federal Rules of Civil Procedure, and such affidavits would be obtainable under those procedures...." Hearings on S. 1160, at 491. 13 / It continued:

"To permit the disclosure of pretrial statements of persons who may never be called as witnesses would unduly interfere with the administration of the National Labor Relations Act, for these persons, who are generally employees, would be reluctant to give statements if they knew that their statements could be revealed to a hostile employer or union in a position to take retaliatory action affecting their economic welfare, even though they may not be called to testify."

Hearings on S. 1160, supra, at 491 (emphasis added). The Board suggested that the exemption be changed to read:

"investigatory files, including statements of agency witnesses until such witnesses have been called to testify in an action or proceeding and request is timely made by a private party for the production of relevant parts of such statements for purposes of cross-examination."

Ibid. This language was even broader than that suggested by Senator Humphrey, supra, which would have applied only to witness statements.

13 /Hearings on S.1160 Before the Subcomm. on Admin. Pract. & Proc. on the Judiciary, 89th Cong., 1st Sess., at 486,490(1965)(Letter from William Feldsman, Solicitor, N.L.R.B. to Senator Eastland, Chairman, Senate Comm. on the Judiciary, May 11,1965)(hereinafter "Hearings on S. 1160")

Another bill, S.1336,would have explicitly incorporated the deposition-discovery rules of the Federal Rules of Civil Procedure in the F.O.I.A.(Sec.6(h)). The Board objected to that provision also on the grounds that, in Board proceedings, "discovery is not necessary and would only delay the administrative process." Hearings on S.1160, supra, at 492.

Congress apparently found this proposal objectionable. It retained the exemption substantially in the form suggested by Senator Long: "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Pub. L. 89-487. The Congressional Reports on S. 1160 revealed that the exemption would afford the Board essentially the protection it sought: conformity to its Jencks Rule. The Senate Report stated:

"Exemption No. 7 deals with 'investigatory files compiled for law enforcement purposes.' These are files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court."

S. Rept. No. 813, 89th Cong., 1st Sess., at 9 (1965). 14 / The House Report similarly explained:

"This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."

14 / See also, id., at 3:

"It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation."

H.R. Rept. No. 1497, 89th Cong., 2d Sess., at 11 (1966). With technical amendments made during codification,¹⁵/the exemption read:

"investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency...."

5 U.S.C. § 552(b) (7) (1967).

¹⁵ /See, H.R. Rept. No. 125, 90th Cong., 1st Sess. (1967).

B. The Application Of The 1967 Exemption

The leading interpretation of former exemption 7 is contained in this Court's decision in Frankel v. Securities & Exchange Commission, 460 F.2d 813 (2d Cir.), cert. denied, 409 U.S. 882 (1972). There, a divided panel (per Hays, C.J.), after reviewing the 1965-66 Congressional Reports, concluded:

"These Reports indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: [1] to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and [2] to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement."

Id., at 817. Dissenting, Judge Oakes found the first reason valid, but concluded that the second was "largely groundless." Id., at 817-818.

Applying the Frankel rationale to Board proceedings, particularly the second ground, a number of courts ruled that the agency's investigative files should not be disclosed. Wellman Industries, Inc. v. N.L.R.B., 490 F.2d 427 (4th Cir.) cert. denied 419 U.S. 834 (1974); see also, Clement Bros., Inc. v. N.L.R.B. 282 F. Supp. 540, 542 (N.D. Ga. 1968), approved, N.L.R.B. v. Clement Bros., Inc., 407 F.2d 1027, 1031 (5th Cir. 1969); 16/ Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 593-594 (D.P.R. 1967). A similar rationale had been applied to discovery attempts in non-F.O.I.A. cases. See, e.g., Intertype Co. v. N.L.R.B., 401 F.2d 41 (4th Cir.), cert. denied, 393 U.S. 1049 (1969); N.L.R.B. v. National Survey Service, Inc., 361 F.2d 199, 206 (7th Cir. 1966).

16/Frankel cited the Fifth Circuit's opinion in Clement Brothers in support of the proposition that confidentiality should be maintained "even after an investigation and an enforcement proceeding have been terminated." 460 F.2d at 813. -13-

Significantly, as events would later demonstrate, the Frankel rationale also became the basis for a number of decisions in the Court of Appeals for the District of Columbia Circuit. Weisberg v. U.S. Dep't. of Justice, 489 F.2d 1195, (D.C. Cir. 1973) (en banc), cert. denied, 416 U.S. 993 (1974); Center for National Policy Review v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974); Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73 (D.C. Cir. 1974); Ditlow v. Brinegar, 494 F.2d 1073, cert. denied, 419 U.S. 974 (1974); Aspin v. Dep't. of Defense, 491 F.2d 24 (1973). 17/ In these cases, despite the lack of any imminent enforcement proceeding shown by the Government, the Court held that the material in investigative files sought by the plaintiffs should be withheld. The reasoning of the Court of Appeals in Ditlow v. Brinegar, supra, was typical:

"...[I]f the documents in issue are clearly to be classified as 'investigatory files compiled for law enforcement purposes,' the exemption attaches, and it is not in the province of the courts to second-guess the Congress by relying upon considerations which argue that the Government will not actually be injured in a particular case."

494 F.2d at 1074. Holdings such as this one were to arouse Congressional ire and result in the 1974 amendments to exemption 7. See, N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 164 (1975).

17/Frankel is cited as authority in Weisberg (at 1199); Center For National Policy Review (at 373); Rural Housing Alliance (at 80 n. 42); and Aspin (at 29-30). Ditlow is a per curiam opinion relying on Weisberg.

C. The Legislative History Of The 1974 Amendments.

1. The background

Exemption 7 was not a major point of concern during most of the legislative history of the 1974 amendments to the F.O.I.A. The legislative Reports show that Congress was generally preoccupied with procedural and administrative aspects of the statute. H.R. Rept. No. 92-1419, 92d Cong., 2d Sess., at 15-18, 81-85 (1972); H.R. Rept. No. 93-876, 93d Cong., 2d Sess., at 4-5, 10-11 (1974); S. Rept. No. 93-854, 93d Cong., 2d Sess., at 1, 3 (1974); see also, S. Conf. Rept. No. 93-1200 [H.R. Conf. Rept. No. 93-1380], 93d Cong., 2d Sess. (1974). Nevertheless, even in the earlier stages of Congressional proceedings there were intimations of unrest with respect to application of the exemptions. See, H.R. Rept. No. 92-1419, supra, at 16 (criticizing the "blanket confidentiality that is contrary to the law" in applying exemption 4); id., at 83-84 (discussing legislative objectives for amendments to the exemptions); H.R. Rept. No. 93-876, supra, at 7-8, 10 (discussing exemption 1). The 1974 Senate Report emphasized:

"Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather they are only permissive. They merely mark the outer limits of information that may be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate - as well as that the intent of the exemption relied on allows - that the information should be withheld."

S. Rept. No. 93-854, supra, at 6 (emphasis added). While the Senate Report recognized that the history of the original Act was less than clear, and there was now controversy over the scope and desirability of some of the exemptions, except for exemption 1 it decided to leave the §552(b) unchanged. The Report stated:

"The risk that newly drawn exemptions might increase rather than lessen confusion in interpretation of the FOIA, and the increasing acceptance by the courts of interpretations of the exemptions favoring the public disclosure originally intended by Congress, strongly militated against substantive amendments to the language of the exemptions."

Id., at 7. It found existing court decisions were "generally consistent" with the Act's intent, but cautioned

"that by leaving it unchanged the committee is implying acceptance of neither agency objections to the specific changes proposed in the bills being considered, nor judicial decisions which unduly constrict the application of the Act."

Ibid.

Yet, later in the Report, in the context of discussing the desirability of in camera inspection and de novo review, the Senate Committee did specifically advert to a restrictive interpretation then being urged in the District of Columbia Circuit which would foster the amendment to exemption 7. The Committee stated, disapprovingly:

"It should be noted that on at least two occasions, however, the government has taken the position that the seventh exemption (subsection (b)(7)) relating to disclosure of investigatory files also represents a blanket exemption

where in camera inspection is unwarranted and inappropriate under the statute. (Stern v. Richardson, No. 179-73, D.C. Cir., Sept. 25, 1973; Weisberg v. Department of Justice, No. 71-1026, D.C. Cir., reargued en banc.). By expressly providing for in camera inspection regardless of the exemption invoked by the government[,] S. 2543 would make clear the congressional intent--implied but not expressed in the original FOIA--as to the availability of an in camera examination in all FOIA cases. This examination would apply not just to the labeling but to the substance of the records involved."

S. Rept. No. 93-854, supra, at 17 (emphasis added in part). Although directed to in camera inspection, these remarks presage the revision of the "investigative files" exemption itself. For, if the conditions necessary to invoke the seventh exemption could be satisfied merely by showing the nature of the file (investigative), the purpose for its compilation (law enforcement), and the existence of an enforcement proceeding (establishing unavailability to a private party), there would be no need for a court to conduct an in camera inspection. The material contained in the file would be exempt as a matter of law. Thus, the inclusion of the in camera inspection provision in the amended Act, 18 / complements the subsequent amendment to exemption 7.

18 / 5 U.S.C. § 552(a)(4)(B); see, S. Conf. Rept. No. 93-1200, supra, at 7-8.

2. The amendment of Exemption 7

a. The legislative statements

During floor debate, Senator Hart introduced an amendment (No. 1361) which in modified and expanded form would become new exemption 7. He explained:

"My reading of the legislative history suggests that Congress intended that this seventh exemption was to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have.

Recently, the courts have interpreted the Seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes--a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made."

120 Cong. Rec. S9329 (daily ed., May 30, 1974) (emphasis added).

The Senator continued:

"That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966. Then, as now, we recognized the need for law enforcement agencies to be able to keep their records and files confidential where a disclosure would interfere with any one of a number of specific interests, each of which is set forth in the amendment that a number of us are offering. 19 /

19 /One of those offering the amendment was Senator Humphrey, whose 1964 amendment to S.1660 was largely responsible for the language of exemption 7 as it appeared in the 1967 Act. See, supra pp. 8-9.

This amendment *** explicitly places the burden of justifying non-disclosure on the Government which would have to show that disclosure would interfere with enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal privacy, reveal the identity of informants, or disclose investigative techniques of procedures.

* * *

Our amendment is broadly written, and when any one of the reasons for non-disclosure is met, the material will be unavailable. But the material cannot be and ought not to be exempt merely because it can be characterized as an investigatory file compiled for law enforcement purposes."

Id., at S9329-S9330 (emphasis added).

Senator Kennedy then added that "in narrowly and mechanically interpreting the seventh exemption, [the courts have] strayed from the requirements and the spirit of the Freedom of Information Act." Id., at S9331. The purpose of the amendment, he said, was to "make clear our intention for courts to look behind the investigation mark stamped on a file folder," thus "reemphasizing and clarifying what the law presently requires." Ibid. The amendment was adopted.

The purpose of the amendment as a whole, then, was to require the Government to "be specific about safeguarding the legitimate investigations that would be conducted by the federal agencies...." 120 Cong. Rec. S 9336 (Remarks of Senator Kennedy).

It was to overrule decisions such as Weisberg v. U. S. Dep't. of Justice, supra, ibid. (remarks of Senators Hart and Kennedy), under which even non-investigative reports might be withheld, id., at S9329 (remarks of Senator Hart), and to reinstate a "balancing basis" for determining whether a particular investigative record should be withheld. Id., at S9336.

b. Other indicia of intent

Some further insight into this Congressional purpose may be gleaned from reviewing the dissenting, lower court and vacated opinions in the Frankel-Weisberg line of cases. Thus, in Frankel v. Securities & Exchange Commission, supra, Judge Oakes expressed the view that a general fear of interference with enforcement procedures resulting from disclosure was unwarranted; that the courts could deal with any particular problems arising from disclosure in specific cases, by reason of their experience in determining "good cause" in private parties' litigation with the Government. 460 F.2d at 820. This view was adopted in a committee report of Bar of the City of New York, included in the Congressional Record during the introduction of the amendment to exemption 7. 120 Cong. Rec. S9330-9332 (daily ed., May 30, 1974).

In the panel opinion in Weisberg v. U. S. Dep't. of Justice, supra, 20 / Judge Kaufman cited approvingly the exemption 7 standard set out in Bristol-Myers Co. v. F.T.C., 424 F.2d 935, 939-40 (D.C. Cir. 1970), cert. denied, 400 U.S. 824 (1970):

"[T]he District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into question the exemption for investigative files, and if so whether the particular documents sought by the company are nevertheless discoverable."

Id., at 1204 (emphasis added). Later in the opinion, the Court recognized that the contents of an F.B.I. investigative file might require protection even after completion of the investigation proceeding for which it was initially prepared. It stated:

"The data contained in such a file may, however, require the protection of secrecy so as not to dry up future sources of information or to pose a danger to the persons who supplied the information or to prevent invasion of personal privacy."

20 / This unreported opinion, written by District Judge Frank Kaufman (sitting by designation), was vacated when the D.C. Circuit entered its order for rehearing en banc. 489 F.2d at 1197 n.2. It is quoted in substantial part in the dissenting opinion of Chief Judge Bazelon in the decision after rehearing, Id., at 1204-1205.

The case involved an attempt to obtain certain spectrographic test reports contained in an F.B.I. investigative file on the assassination of President Kennedy. The panel ordered disclosure; the Court, sitting en banc, refused to.

Id., at 1205 n. 8 (emphasis added). The Court concluded, however:

"5 U.S.C. §552(b)(7) would appear sufficiently flexible to include within its protection such an investigatory file when and if such protection is required."

Ibid. (emphasis added).

The Court also discussed the burden of proof which the Government would have to sustain in order to claim exemption. Referring critically to an affidavit submitted by the F.B.I., the Court wrote:

"...[E]ven if that affidavit is given full consideration, it is a document which is most general and conclusory and which in no way explains how the disclosure of the records sought is likely to reveal the identity of confidential informants, or to subject persons to blackmail, or to disclose the names of criminal suspects, or in any other way to hinder F.B.I. efficiency. The conclusion that the disclosure Weisberg seeks will cause any of those harms is neither compelled nor readily apparent, and therefore does not satisfy the Department's burden of proving under 5 U.S.C. §552(b)(7), as the Department must, some basis for fearing such harm."

Id., at 1205 (footnotes omitted). The court emphasized that the Government must establish "the nature of some harm which is likely to result from public disclosure of the file." Id., at 1206.

In Ditlow v. Volpe, 362 F.Supp. 1321 (D.D.C. 1973), where the plaintiffs sought certain National Highway Traffic Safety Administration records relating to pending investigations of safety defects in new automobiles, the Court rejected an exemption 7 claim, stating:

"While the open files here involved could conceivably lead to a civil enforcement proceeding, the agency has not made the required showing 'that disclosure of the files sought is likely to create a concrete prospect of serious harm to its law enforcement efficiency,'"

citing the panel decision in Weisberg, supra. The Court of Appeals reversed, based on its subsequent en banc decision in Weisberg. Ditlow v. Brinegar, supra, 494 F.2d at 1074.

Certain conclusions emerge from this review of the law and Congressional intent. First, Congress sought to overrule as a basis for exemption, generalized assertions that the confidentiality of procedures by which an agency conducted an investigation and by which it obtained information would be compromised. 120 Cong. Rec. S9332 (Report Of The Committee On Federal Legislation Of The Association Of The Bar Of The City Of New York); cf. Frankel v. Securities and Exchange

Comm., supra, 460 F.2d at 817. 21/ Second, it changed the focus of inquiry from a broad view of "investigatory files" to a narrower concern with particular "investigatory records." Compare, 5 U.S.C. §552(b)(7)(1967), and 5U.S.C. §552(b)(7)(A)-(E) (1974). Third, it emphasized that the "Government....would have to show that disclosure would" result in a specified statutory harm. 120 Cong. Rec. S9330 (daily ed., May 30, 1974) (Remarks of Senator Hart). This makes the "burden of proof" provision of amended §552(a)(4)(B) clearly applicable to exemption 7. Fourth, Congress eliminated from the statute the "savings" clause of the original exemption - "except to the extent available by law to a party other than an agency" - which the Government had construed as fixing the maximum disclosure it need allow. 22/

21/ Congress did retain an exception in amended exemption 7(E) for specialized investigative techniques. As the Board notes, however: "Exemption 7(E) of the FOIA, 5 U.S.C. §552 (7)(E), which protects investigatory records where their production would 'disclose investigative techniques and procedures,' is not claimed by the Board because it does not apply to routine techniques or procedures which are generally known outside the Government. [S. Conf. Rep. No. 93-1200, supra, at 12.]"

Board Brief, at 8 n.6.

22/ See, Weisberg v. U.S. Dep't. of Justice, supra, where the Court suggests that an F.O.I.A. plaintiff must in fact be engaged in the litigation with the Government in order to qualify as a "party" and to invoke the Act. 489 F.2d at 1203 n. 15.

With this background in mind, we turn to the specific contentions raised by the Board.

D: Clause (A): The Investigative Statements Are Not Exempt Because They Would "Interfere With Enforcement Proceedings."

The Board advances the same arguments which it raised before the District Court (Board Brief, at 8-13). Essentially, it maintains that the object of new exemption 7(A), like its predecessor, is to prevent premature discovery in an enforcement proceeding, so that the General Counsel can present his strongest case in court (Id., at 9-11). The District Court found, however, based upon its in camera inspection of the statements:

"...[I]t does not appear that the specific enforcement proceeding would be harmed. Whatever value Title Guarantee may gain from the information sought will not be based on the timing of such release but rather on its determination of whether any material contained in the released documents supports its contentions. This value is precisely that which is contemplated by the Freedom of Information Act and is not restricted by the exemptions to the Act. See, N.L.R.B. v. Schill Steel Products, Inc., 408 F.2d 803, 805 (5th Cir. 1969)."

(A.74).

The District Court was correct. The Board's argument follows directly from the explanation given in Frankel v. Securities & Exchange Comm., supra. While Congress specifically

overruled the second ground given in that decision for the investigatory files exemption (confidentiality of investigative techniques), 23/ it also modified the first ground:

"...to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court...."

460 F.2d at 817.

This language in Frankel was based on the Court's reading of the 1965 Senate Report and the 1966 House Report on the original Act. The Senate Report made clear that even the possibility of harm resulting from "premature" disclosure of investigative files was sufficient to invoke the exemption. Thus, it stated:

"[The] disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in Court."

S. Rept. No. 813, supra, at 9 (emphasis added). The House Report emphasized that "prematurity" was to be measured by reference to the discovery permitted "directly in such [other] litigation or proceedings." H.R. Rept. No. 1497, supra, at 11. In the case of the Board, we have shown, that meant discovery permitted under the agency's Jencks Rule, 29 C.F.R. §102.113(b). See discussion supra, pp. 8-12.

23/ See discussion at p. 24, and n. 21, supra, discussing exemption 7(E).

The 1974 amendments changed the law. While continuing to recognize that premature disclosure could harm the performance of Government agencies, Congress put those agencies to their proof: It required them to show that their proceedings would be harmed by disclosure. As Senator Hart explained exemption 7(A), nondisclosure would obtain:

"First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court - a concrete prospective law enforcement proceeding - would be harmed by the premature release of evidence or information not in the possession of known or potential defendants * * * In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding."

120 Cong. Rec. S9330 (daily ed. May 30, 1974). Here, the Board introduced no evidence -- no testimony or other proof, not even an affidavit -- showing that the administrative proceeding in this case would be harmed. (A. 73, 74, 97).

The Board argues, however, that the intent of the new exemption 7(A) is the same as that of the old exemption 7, and that all prior caselaw remains applicable (Board Brief, at 9). 24/ The Board is incorrect.

One obvious difference between the old and new exemptions is the removal of the clause, "except to the extent available by law to a party other than an agency." This deletion 24/It made a similar argument before the District Court in its Motion for Stay of Order Pending Appeal(A.80). The Court, however, rejected this contention, stating that Exemption 7, rather than representing the codification of the pre-amendment case law-as the Board contends-was the result of Congressional dissatisfaction with the application of the act...and was designed to narrow the exemption." (A. 96,97).

is significant. The legislative history of amended exemption 7, supra, indicates a Congressional concern with the mechanical application of the former exemption. Instead of recognizing this provision as a "savings" clause, defining only the minimal disclosure required, the Government viewed the clause as licensing the maximal withholding permitted. To insure restoration of a proper perspective, Congress rewrote the exemption.

It is true that Congress remained concerned about "premature" disclosure under the amended Act, as the Board asserts (Board Brief, at 9). But its concern for abuses under the former exemption was at least equal. Congress changed the exemption from one which relied on a purely external standard based on agency regulations, to another which made the facts and circumstances of the particular case paramount. To accept the Board's argument that nothing has been altered, one must blink at this legislative history. One must also accept the illogical proposition that the Board's "case in court" in this proceeding "would be harmed by the premature release" of the statements, 120 Cong. Rec. S9330 (remarks of Senator Hart) supra (emphasis added); see, S. Conf. Rept. No. 93-1200, supra, at 11, simply because premature release "could harm" the Government's case in court." S. Rept. No. 813, supra, at 9 (emphasis added). The Board fails to recognize that a substantial likelihood of harm is not the same as a mere possibility thereof. It has not shown such likelihood of such harm here. Moreover, the Board has not shown that the District Court's finding of "no harm" 25 / was clearly erroneous.

25 / "[T]he court has conducted in camera examination of the material in question and has determined that none of these harms would be forthcoming from disclosure of the specific materials at issue here." (A.97).

The Board suggests -- for the first time -- that disclosure of the type of information sought by Title Guarantee could result in "jeopardizing the collective-bargaining relationship or compromising the union's position in negotiations." (Board Brief, at 12; see also, id., at 20). This is a remarkable contention in a case where a company already is charged with an unlawful refusal to bargain, and the Company has raised as an affirmative defense that the union does not represent a majority of the employees (A.24). To us, this smacks of fear of revealing exculpatory evidence. It hints that the union may not represent a majority of unit employees, or at least that the employer's objective considerations in withdrawing recognition may be corroborated in these affidavits. If, as the Board asserts (Board Brief, at 11), the General Counsel performs in a capacity like that of a U.S. attorney in a criminal case, then he should act like one. He should yield up exculpatory evidence prior to trial. Brady v. Maryland, 373 U.S. 83 (1963). 26 / Thus, assuming these general suggestions mirror the facts in this case, they do not justify withholding. They compel disclosure.

26 /The analogy between criminal prosecutions and Board unfair labor practice proceedings is, at best, a rough one. N.L.R.B. v. Sears, Roebuck & Co., supra, 421 U.S. at 156 n. 22; see, State v. Tune, 13 N.J. 203, 98 A. 2d 88,884 (1953). We note, however, that unlike the Board's rule, the Jencks Act does not protect the statements of persons who are not potential witnesses at trial. 8 Moore's Federal Practice, ¶16.03[2] (pp. 16-23 to 16-25) (2d ed. 1975). In addition, unlike a Board respondent, a criminal defendant is now entitled to be notified prior to trial of the witnesses to be called against him. F.R. Crim. P. Rule 16(a)(1)(E) (1975).

The Board concludes from its unproven assertions that if it is "unable to protect this information from premature disclosure, its ability to investigate further unfair labor practice charges will be seriously impaired." (Board Brief, at 12). The Board's fear is unfounded. Title Guarantee does not seek a rule of general applicability; nor does the amended statute permit one. Senator Hart explained that exemption 7(A) would be available

"where the agency could show [in the context of the particular enforcement proceeding] that the disclosure would substantially harm such proceedings by impeding any necessary investigation before the proceeding."

120 Cong. Rec. S 9330 (May 30, 1974). Here, Title Guarantee did not seek the information until the Board's investigation was completed and an administrative complaint had been issued. And even in the unlikely event some investigation did take place after issuance of the complaint, there was little Title Guarantee could have done to interfere with it, since the District Court did not order production until a few days before the scheduled unfair labor practice hearing.

We regard as persuasive the reasoning of Judge Hemphill in Deering-Milliken, Inc. v. Nash, ____ F. Supp. ____, 90 L.R.R.M. 3138 (D.S.C., No. 75-864, decided November 12, 1975), rejecting a Board contention that "(7)(A) exempts from production the documents in question because they would not be discoverable under the current procedures employed in N.L.R.B. hearings." 90 L.R.R.M. at 3143. Finding it

"totally inconsistent with the policy of the 1974 amendments to exempt NLRB files solely because the Board's own regulations would not allow their discovery in an NLRB proceeding,"

Id., at 3143-3144, the Court went on to state:

"This court's responsibility is to determine whether the NLRB has proved the applicability of the exemptions it claims, not to rubber-stamp its approval of agency-imposed classifications and regulations. The court has not taken and will not take this responsibility lightly."

Id., at 3144. Exercising this responsibility, the Court in Deering Milliken found that disclosure would not harm or interfere with Board proceedings. 26/ On the contrary, it found that "disclosure could

26/See also, The Cessna Aircraft Co. v. N.L.R.B., ____ F. Supp. ____, 90 L.R.R.M. 3339 (D. Kan., No. 75-111-C6, decided December 2, 1975); N.L.R.B. v. Hardeman Garment Corp., ____ F. Supp. ____ (W.D. Tenn., No. C-75-148, decided November 25, 1975) Slip order, at 2-4, holding that the Board had failed to demonstrate any statutory harm in disclosure, relying on the October 10 Opinion in Title Guarantee.

only have a beneficial effect on the proper resolution of the... [Board] determination." Ibid. Moreover, it concluded, "the NLRB should welcome the opportunity to have any errors revealed and corrected." Ibid. The Court's remarks, although directed to back pay proceedings, are equally applicable to the testimony of Board witnesses in an unfair labor practice proceeding. See, N.L.R.B. v. Stark, ___ F.2d ___, 90 L.R.R.M. 3076, 3081-82 (2d Cir., No. 74-2658, Nov. 5, 1975). 27 /

In sum, in order to assure that the courts would apply exemption 7 only on an "as needed" basis, Congress removed the external agency standard contained in the second clause of the former exemption, and substituted a requirement that the Government "show" that its proceedings "would" be harmed by disclosure. The Government has not made that showing here. It has mistaken an element of its proof for a rule of law. Without this showing, its argument is reduced to a plea for mere tactical advantage, that it should be able to discover its opponent's case through investigation, but that its opponent should not be granted a corresponding right. This Court has stated, however, in N.L.R.B. v. Stark, supra:

"The interest of counsel for the General Counsel, like that of an Assistant United States Attorney, is--or should be--not that he 'shall win a case, but that justice shall be done,' Berger v. United States, 295 U.S. 73, 88 (1935)."

Id., at 3081-3082. That interest would be served by disclosure in the instant matter, in accordance with the District Court's Order.

27/ The decision in Climax Molybdenum Co. v. N.L.R.B., ___ F.Supp. ___, 90 L.R.R.M. 3126 (D. Colo., No. 75-M-977, decided November 14, 1975) (Cited in Board Brief, at 10,13), holding as a matter of law (and without in camera inspection) that exemption 7(A) protects all Board investigative statements, is fundamentally inconsistent with the F.O.I.A. By deferring to "the Board's determination that disclosure of its investigative files would interfere with the enforcement proceeding in this case," id. at 3127 (emphasis added), ...Cont'd.

E. Clause (C): Disclosure Would Not Constitute An
"Unwarranted Invasion Of Personal Privacy"

The Board's argument that disclosure of the investigative statements would "constitute an unwarranted invasion of personal privacy," 5 U.S.C. §552(b)(7)(C), was rejected by the District Court. (A. 74-75; A. 96-97 (summarily)). The Court found unpersuasive the Board's claim, again made on appeal, that the right to privacy includes the "'right to select the people to whom ... (one) will communicate his ideas.'" (A. 75) (Board Brief, at 15).

This exemption -- derived from exemption 6 28/ -- was intended to apply to "'intimate details' of 'a highly personal nature'" about an individual. Getman v. N.L.R.B., 450 F.2d 670, 674 (D.C. Cir.), stay denied, 404 U.S. 1204 (1971); 29/ see also, Robles v. E.P.A., 484 F.2d 843, 845 (4th Cir. 1973). While introducing the amendment which would become exemption 7(C), Senator Hart explained:

"By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption."

27/ (Cont'd.) the Court in Climax Molybdenum acted in derogation of its statutory duty to "determine the matter de novo...whether such records shall be withheld...." 5 U.S.C. §552(a)(4)(B). There is nothing in the legislative history of the amended Act to suggest that Congress intended to exempt the Board from its provisions. The Colorado Court's decision would do just that. (The decision in Climax Molybdenum was distinguished in Cessna, supra, at n.1, on the grounds that in Cessna an in camera inspection of the documents had been conducted.)

28/ Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). That exemption was not affected by the 1974 amendments.

29/ Citing, H.R.Rept. No. 1497, supra, at 11; S. Rept. No. 813, supra, at 9.

120 Cong. Rec. S. 9330 (May 30, 1974). 30/

The District Court correctly refused to extend the coverage of the exemption to matters beyond its intended scope. (A. 74-75) (cases cited). There was no need, therefore, to engage in the equitable "balancing" between the need for privacy and the interest in disclosure which this Court and others have said is appropriate in exemption 6 cases. Rose v. Department of the Air Force, 495 F. 2d 261, 269-270 (2d. Cir. 1974), decision pending in S. Ct. (No. 74-489); Getman v. N.L.R.B., supra, 450 F.2d at 674 n. 10; Wine Hobby, U.S.A., Inc. v. I.R.S., 502 F.2d 133, 137 (3d Cir. 1974). Contra: Robles v. E.P.A., supra, 484 F.2d at 846-847; Wellford v. Hardin, 444 F.2d 21, 24-25 (4th Cir. 1971). The Board mistakes this balancing for the substance of the exemption (Board Brief, at 14-15). 31/

30/As originally proposed, exemption 7(C) would have contained the expression, "clearly unwarranted," as in exemption 6. Ibid. While the 1974 bill was before the Joint Conference Committee, however, President Ford recommended to the Senate and House Conference Chairmen (Sen. Kennedy and Rep. Moorhead) that the words "clearly unwarranted" be deleted. 120 Cong. Rec. S17828-30; 120 Cong. Rec. H 10001-10003. In response, the Conference Committee agreed to delete the word "clearly." 120 Cong. Rec. H 10003; S. Conf. Rep. No. 93-1200, supra, at 11. The distinction between "clearly warranted" and "unwarranted" has not yet been defined by caselaw. See, generally, Getman v. N.L.R.B. supra, for a discussion of the "clearly unwarranted" standard under exemption 6.

31/The Board attaches too much importance to the deletion of the word "clearly" (Id., at 15). To be sure, this change was intended to make the Government's burden lighter; but it was only a change in emphasis, not in substance.

Similarly, the Privacy Act of 1974 (89 Stat. 1896), affords little support for the Board's argument (Board Brief at 15 n. 16). That Act was intended to apply to records pertaining to such matters as an individual's "education, financial transactions, medical history, and criminal or employment history." 5 U.S.C. §552a(a) (4) (1974). Such matters are not, or should not be, involved here.

Even if balancing were proper in this case, we think that the circumstances would justify disclosure to Title Guarantee. First, a request for documents for use in a legal proceeding is a legitimate interest under the Act, Getman v. N.L.R.B., supra, at n. 33. Second, one of the factors to be considered in determining whether to release information, is the availability or unavailability of that information from other sources. Getman v. N.L.R.B., supra; Tuchinsky v. Selective Service Systems, 418 F. 2d 155 (7th Cir. 1969). Here, the absence of discovery in Board proceedings and the adversary relationship of the charging party, require resort to the statements in the Board's file. Accordingly, even under a balancing test, these statements should be disclosed.

The District Court's decision on amended exemption 7 (C) was correct. Deering Milliken, Inc. v. Nash, supra, 90 L.R.R.M. at 3147 (citing approvingly the District Court's rejection of the Board's "tenuous" claim in Title Guarantee); 33/ The Cessna Aircraft Co. v. N.L.R.B., supra, 90 L.R.R.M. at 3340; Climax Molybdenum Co. v. N.L.R.B., supra, 90 L.R.R.M. at 3127; N.L.R.B. v. Hardeman Garment Corp., supra, slip order, at 5. 34 /

32/Citing, Benson v. G.S.A., 289 F.Supp. 590 (W.D. Wash. 1968), aff'd on other grounds, 415 F.2d 878 (9th Cir. 1969).

33/In Deering Milliken, the South Carolina Court followed the Fourth Circuit approach to exemption 6, which precludes balancing. See, Robles v. E.P.A., supra. Since much of the information sought in that case contained medical and financial information, the Court was constrained to find the documents exempt under §552(b)(7)(C).

34/Margo Poss v. N.L.R.B., 2d (D. Colo., Civ. Action No. 75-A-825, decided December 17, 1975) Slip opinion and order, at 3.

F. Clause (D): The Board Has Not Demonstrated That Disclosure Of The Witness Statements Would Disclose The Identity Of A "Confidential Source."

Clause (D) of exemption 7, insofar as material here, excepts from disclosure agency records where their production would "disclose the identity of a confidential source ..."

5 U.S.C. §552(b)(7)(D); see, S. Conf. Rept. No. 93-1200, supra at 12.

Noting that the agency "relies heavily upon information furnished by the negotiators themselves" in refusal-to-bargain cases, the Board asserts that such "union officials..may be reluctant to have their identi[t]y disclosed for fear of jeopardizing their relationship with the employer and thereby upsetting the stability of the collective-bargaining relationship." (Board Brief, at 20). It further claims that "an employer's power over his employees' jobs is a significant restraint on their willingness to cooperate with Board's agent's agents," and that "individuals ... in many cases would suffer severe detriment if their identities were known," citing, Kaminer v. N.L.R.B., ____ F. Supp. ____, 90 L.R.R.M. 2269, 2271 (S.D. Miss. 1975). (Id., at 19). Like the District Court (A.75-76; A. 96-97), we find these reasons insufficient to justify the withholding of the statements.

1. The legislative history.

As originally proposed by Senator Hart, amended exemption 7(D) (then 7(C)) would have applied to investigative records, the production of which "would *** disclose the identity of an informer" 120 Cong. Rec. S9329 (May 30, 1974). The Senator explained:

"...[T]he amendment protects without exception and without limitation the identity of informers. It protects both the identity of informers and the information which might reasonably be found to lead to such disclosure. These may be paid informers or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential."

Id., at S9330. Senator Hart further noted, in a memorandum letter distributed to members of the Senate, that "If informants' anonymity -- whether paid informers or citizen volunteers -- would be threatened, there would be no disclosures." Id., at 9337 (emphasis added).

In conference, however, upon the initiative of the House Conferees, present clause (D) of exemption 7 was extended and clarified. 35/ The term "informer" was dropped, and replaced by the expression, "confidential source." The Conference Report explains:

"The substitution of the term 'confidential source' in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred."

35/"Conference Notes - The Freedom of Information Act Amendments" (Unofficial), prepared by the staff of the Senate Judiciary Subcomm. on Admin. Pract. & Proc., in Freedom of Information Act And Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts, and Other Documents, Comm. on Gov't. Ops., U.S. House of Reps., Subcomm. on Gov't. Info. and Ind'l. Rights; Comm. on the Judiciary, U.S. Senate, Subcomm. on Admin. Pract. and Proc., 94th Cong., 1st Sess., at 118 (Jt. Comm. Print, 1975).

S. Conf. Rept. No. 93-1200, supra, at 12. The Committee of Conference also distinguished between civil law enforcement investigations on the one hand, and criminal law enforcement or lawful national security investigations on the other.

The Conference Report continued:

"Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes -- either civil or criminal in nature -- the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source."

Ibid. However, in criminal and national security investigations, the Report explained, "all of the information furnished only by a confidential source" could be withheld, as well. Ibid. (emphasis in original.)

The amendment in conference was primarily aimed at protecting informants in criminal investigations. In fact, Senator Hart suggested that the provision dealing with criminal investigations constituted an exception to the new exemption 7, conferring "blanket protection" not only for the identity of the confidential source, but for the information he provided as well. 120 Cong. Rec. S19812 (November 21, 1974). "[It] relieves [the agency] of the burden of showing that disclosure would actually reveal the identity of a confidential source," he explained. Ibid. However, as Senator Kennedy noted, "source information..compiled in civil investigations" would be available. Id., at S1981.

Against this backdrop, we discuss the applicability of the exemption to this proceeding.

2. The Board failed to demonstrate that the statements were given under express assurances of confidentiality.

The Conference Report suggests that an express assurance of confidentiality to a source in a civil law enforcement investigation is sufficient to protect the identity of the source. S. Con. Rept. No. 93-1200, supra, at 12. 36/ In the instant case, however, the District Court found the Board had presented no evidence that the information was elicited upon an express assurance of confidentiality. (A. 75) In response to an inquiry by the Court, "Were these statements given under an assurance of confidentiality at the time or not?", Board counsel replied, "I don't know." (A. 62 [Tr. 30]).

Therefore, it becomes necessary to examine the Board's contentions, supra, that it is reasonable to infer an offer of confidentiality in the circumstances.

36/ We note, however, that, under the F.O.I.A., courts have held that promises of confidentiality, in and of themselves, could not defeat the right of disclosure. See, e.g., Petkas v. Staats, 501 F.2d 887, 889 (D.C. Cir. 1974); Rodiles v. E.P.A., supra; Getman v. N.L.R.B., supra. The reason for these holdings was that if a promise of confidentiality were alone sufficient to defeat disclosure, the Act would be rendered a nullity. As one commentator has observed with respect to the "confidentiality" provision of exemption 4 (5 U.S.C. §552(b)(4)):

"Exclusive reliance on this inquiry, however, would leave the scope of subsection (b)(4) to be determined solely by actions of agencies and their sources, thus undermining the Act's guarantee of de novo judicial review."

Note, 88 HARV. L. REV. 470, 473 n. 16(1974). See, H.R. Rept. No. 92-1419, 92d Cong., 2d Sess., at 15-16(1972), citing as one of the "more flagrant abuses of the FOI Act" the Price Commission's solicitations of confidentiality from companies applying for price increases, and stating, "[T]he Committee knows of no agency that has specific statutory authority to extend blanket exemption, let alone to solicit the exemption of confidentiality." (emphasis added).

The same reasoning applies to exemption 7(D) under the amended Act. Thus, even where express assurances of confidentiality are given, a court should inquire whether those assurances were reasonable under the circumstances. In the instant matter, the District Court concluded, it would not have been reasonable in the circumstances to infer assurances of confidentiality. (A. 75). That being so, disclosure should not have been defeated even by express assurances, had they been given.

3. The District Court properly concluded that an offer of confidentiality should not be inferred.

The District Court stated (A. 75-76):

"The court has reviewed the material and concludes that no such inference is reasonable. The nature of the material as well as the identity of the deponents indicates that an understanding of confidentiality or lack of it would be entirely irrelevant to whether the information would have been offered to the Board."

a. Union Officials

The unfair labor practice charges in the case allege an unlawful refusal to bargain by the Company. (A. 10; A. 12; A.14). The aggrieved party is the Union (Ibid.) There is no dispute that the Company refused to bargain with the Union on May 23, 1975 (A. 18 [par. 7]; A. 24 [par. 7]); the only question is whether or not the refusal was unlawful. (Ibid.).

The refusal took place at a negotiating meeting between representatives of the Company and the Union. Present at this meeting were the Union negotiators, Vice President Albert R. Turbane and Union Administrator Harry Eschenbacher. The Company knows their identity. These are the same individuals who signed the charges on behalf of the Union (A. 10; A. 12; A. 14). There is no doubt but that the Board obtained statements from one or both of these representatives.

Implicit in the District Court's reasoning is a recognition that an unfair labor practice proceeding is "[neither] a wholly public [n]or a wholly private matter." N.L.R.B. v. Sears Roebuck & Co., supra, 421 U.S. at 156 n. 22; United Automobile Workers v. Scofield, 382 U.S. 205, 218-219 (1965). In the instant

case, the Union has a substantial private interest in the successful prosecution of its charge. It would regain recognition and bargaining rights in a unit of approximately 250 employees. The Board is aware of this private interest and uses it to obtain information from charging parties.

The Board's Statements of Procedure (Series 8, as amended) recite that the charging party shall "submit promptly evidence in... support of the charge." 29 C.F.R. §101.4. More explicit still are the instructions issued by the Board's General Counsel for the guidance of regional personnel, contained in the N.L.R.B. Casehandling Manual (Vol. I., Unfair Labor Practices) (1975). In discussing investigative techniques, the Board agent is admonished that in obtaining an affidavit -- "the keystone of the investigation" -- "he can take a firmer position with a charging party (whether an individual, a union, or an employer) than with a charged party, since the cooperation of the former is a basic requirement." Id., at §10058.2 (emphasis added). The Manual states that the Board agent "should insist" upon the "prompt receipt" of the Charging Party's version of the events and that "The burden of having witnesses available at a date which is the earliest available to the Board agent should be placed on the charging party." Id., at §10056.1. Furthermore:

"The charging party should be ready to submit his proof of what he charges or have a good reason for any delay; otherwise, he should withdraw and refile when ready.

Should there be a failure of cooperation in this respect, without reasonable explanation, a withdrawal request should be suggested; and if necessary, the charge should be dismissed for lack of cooperation."

Ibid. (emphasis added). 36 /

Thus, without saying so explicitly, the District Court strongly suggested that the statements sought by Title Guarantee in this case originated with the charging party Union, whose private interest in prosecuting the charge, combined with a Board sanction for noncooperation, was sufficient to assure Board access to relevant information. Cf. National Parks & Conservation Assoc. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). The District Court's decision finds support in other cases. Climax Molybdenum Co. v. N.L.R.B., supra, 90 L.R.R.M. at 3127; The Cessna Aircraft Company v. N.L.R.B., supra, 90 L.R.R.M. at 3340; Deering-Milliken, Inc. v. Nash, supra, 90 L.R.R.M. at 3144-3145. 37 /

The legislative history of §552(b)(7)(D) also supports the position of the District Court in this matter. It reveals that Congress was primarily concerned with persons commonly thought

36 / Similar language was contained in the former N.L.R.B. Field Manual, §10056.1 (1971).

37 / The Court in Deering-Milliken stated:

"in this case, the N.L.R.B. has established no express assurance of confidentiality and the identity of the sources and the nature of the information supplied make it inconceivable that any such implied assurance would have been desired or given. The claim of privilege is ludicrous***."

Ibid. (emphasis added).

of as "informers," and that the expression "confidential source" was employed simply to make clear that the exemption would not be restricted to paid informers. 120 Cong. Rec. S9330 (Remarks of Senator Hart) (daily ed., May 30, 1974); H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess., at 12 (1974) 38 / An important element of informer status, however, as Senator Hart recognized, is the voluntary nature of the informant's disclosure based on a personal disinterest in the proceedings. 120 Cong. Rec. S9337, supra; see, e.g., Gordon v. United States, 438 F.2d 858, 875 (5th Cir.), cert. denied, 404 U.S. 828 (1971). Such voluntarism was lacking here.

b. Employees

A few employees were also present at the negotiating session when Title Guarantee refused to bargain. As members of the Union negotiating committee, the Company also knows their identity. However, it is unlikely that the Board is dependent upon their statements, for several reasons: First, the Union filed the charges, and its representatives were available to provide statements; second, these employees could only provide cumulative evidence of what the Union representatives had already told the Board about the May 23rd meeting; third, the Union representatives would have had superior knowledge of documentary and other evidence of union support in the unit; and fourth, the Board is relying on a presumption of continuing majority status (A. 54 [Tr. 18]), and thus 39 / See also, N.L.R.B. v. Hardeman Garment Corp., supra, Slip order, at 5.

would not have sought to ascertain individual employee sentiments.

In any case, the problem to which the Board adverts (Board Brief, at 19) of protecting witnesses, mainly employees, prior to testifying, has been largely resolved by the Supreme Court's decision in N.L.R.B. v. Scrivener (A.A. Elec. Co.), 405 U.S. 117 (1972). The decision holds that the protection of §8(a)(4) of the National Labor Relations Act, 29 U.S.C. §158(a)(4), extends to employees who provide statements to Board agents, as well as to those who later testify at hearing. As the Court noted in N.L.R.B. v. Hardeman Garment Corp., ___ F. Supp. ___ (W.D. Tenn., No. C-75-148, Order dated January 6, 1976) (motion to vacate on other grounds pending):

"It is admitted by the N.L.R.B. in its memorandum in support of its motion to reconsider that 'Section 8(b)(4) of 29 USC §158 provides an effective means of protecting witnesses who testify in Board hearings ---.' Scrivener, supra, extends that same protection to investigatory stages."

Slip Order, at 2. Accordingly, we do not agree that the Board's "ability to obtain information in the future, from employees and non-employees alike, would be severely impaired." (Board Brief, at 20). The agency has not shown any basis in the circumstances of this case for its calamitous prediction.

G. Conclusion

For the foregoing reasons, the Board has not shown that the District Court erred in rejecting its exemption 7 claims. This conclusion is reinforced when it is considered that the courts in

other circuits have cited the District Court's October 10th opinion in Title Guarantee, with approval. See, The Cessna Aircraft Co. v. N.L.R.B., supra, 90 L.R.R.M. at 3340; Deering-Milliken, Inc. v. Nash, supra, 90 L.R.R.M. at 3147; N.L.R.B. v. Hardeman Garment Corp., supra, Slip order, at 3-5. Therefore, this Court should affirm the Order of the District Court on the merits of the Board's exemption 7 claims.

POINT II

THE DISTRICT PROPERLY CONCLUDED
THAT THE DOCUMENTS SOUGHT BY
TITLE GUARANTEE MAY NOT BE WITH-
HELD UNDER EXEMPTION 5.

Exemption 5 of the Freedom of Information Act permits the withholding of

"inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

5 U.S.C. §552 (b) (5). The Board argues, as before the District Court, that the affidavits taken during its investigation are exempt under this provision. (Board Brief, at 20-22).

The District Court considered this argument at length (A. 67-71, 96). It found to the contrary. Its own examination of the documents in this case convinced the Court that they contained purely factual matter, and, therefore, under the legislative history and caselaw, did not come within the scope of the exemption (A. 69-71, 96). We agree.

A. The Legislative History Of Exemption 5 Demonstrates A Congressional Concern For Protection Of Deliberative Processes.

1. Senate Bill 1666 of 1964

Exemption 5 originated in an amendment to S. 1666, 88th Cong., 2d Sess. (1964), the predecessor bill to the Freedom of Information Act of 1967. Therein proposed as section 3 (c) (5) of the Administrative Procedure Act, the exemption would have covered only "intra-agency or interagency memorandums or letters dealing solely with matters of law or policy...." 39 /

The Senate Report explaining this provision stated:

"Exception No. 5 relates to 'those parts of intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy.' It is pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency in Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were forced to 'operate in a fishbowl.' The committee is convinced of the merits of this proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government opera-

39 / "This exemption itself had been broadened during its course through the Senate in the 88th Congress. The exemption originally applied only to internal memoranda 'relating to the consideration and disposition of adjudicatory and rulemaking matters.' Section 3(c) of S.1666, 88th Cong., 2d Sess. (1964), introduced in 110 Cong. Rec. 17086. That early formulation came under attack for not sufficiently protecting material dealing with general policy matters not directly related to adjudication or rulemaking. See Hearings on S.1666 and S.1663 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 202-203, 247." Environmental Protection Administration v. Mink, 410 U.S. 73, 90 n. 17 (1973).

tion. All factual material in Government records is to be made available to the public as well as final agency determinations on legal and policy matters which affect the public."

S. Rept. No. 1219, supra, at 6-7 (1964) (emphasis added).

Similar government concerns were expressed in another of the Report's discussions of the proposed exemption, again emphasizing, however, "that there is no exemption for matters of a factual nature." Id., at 14.

During Senate consideration of the Bill, Senator Humphrey proposed a further amendment which would have made the exemption read, "intra-agency or interagency memorandums or letters dealing with matters of fact, law or policy."

110 Cong. Rec. 17667 (July 31, 1964) (emphasis added).

He explained:

"As presently written clause (5) of the amended section 3(c) appears not to exempt intra-agency or interagency memorandums prepared by agency employees for themselves or their supervisors purporting to give their evaluations of the credibility of evidence obtained from witnesses or other sources. The knowledge that their views might become public would interfere with the freedom of judgment of agency employees and color their views accordingly. Memorandums summarizing facts used as a basis for recommendations for agency action would likewise appear to be excluded from the exemption contained in clause (5)."

Id., at 17667 (emphasis added). Responding to this proposal, Senator Long stated:

"The suggestion with respect to exemption (5), adding 'matters of fact' to 'matters of law or policy' would result in a great lessening of information available to the public and to the press. Furthermore, the example cited with respect to intra-agency memorandums giving [evaluations] of the credibility of evidence obtained from witnesses or other sources, leads me to point out that there is nothing in this bill which would override normal privileges dealing with work product and other memorandums summarizing facts used as a basis for recommendations for agency action if those facts were otherwise available to the public."

Id., at 17667-8(emphasis added). The bill passed the Senate on July 31, 1964, without the change proposed by Senator Humphrey.

Id., at 17668.

2. Senate Bill 1160 of 1965

Although passed by the Senate, S.1666 did not become law, since no action was taken by the House of Representatives on the bill before adjournment. In the 89th Congress, on February 17, 1965, a further modified form of S.1666 was introduced in the Senate as S.1160 and in the House as H.R. 5012. 40 / Following hearings in both Houses in the spring of 1965, S.1160, as amended, passed the Senate on October 13, 1965; the House of

40/Subcomm. on Admin. Pract. & Proc. of the Comm. on the Judiciary, U.S. Senate, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, Comm. Print, 93d Cong., 2d Sess., "Discussion of the Legislative History of the Freedom of Information Act," at 6,8 (1974) (footnotes omitted) (hereinafter "Source Book").

Representatives passed this bill the following year, on June 20, 1966. 111 Cong. Rec. 26821 (1965) (Senate passage); 112 Cong. Rec. 13661 (1966) (House passage), Source Book, supra, at 8.

a. The Senate Report On S.1160

The Senate left S.1666 substantially unchanged with respect to exemption 5. In an effort to clarify the scope of withholding in apparent accordance with the Humphrey-Long colloquy, however, it deleted the phrase "dealing solely with matters of law and policy," and substituted therefor the expression, "which would not be available by law to a private party in litigation with the agency." S. Rept. No. 813, supra, at 1 (Amendment No. 8) (1965). Explaining this amendment, the Report continued:

"The purpose of clause (5) is to protect from disclosure only those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency. This would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties."

Id., at 2. Nevertheless, the Senate Report's substantive discussion of this exemption, including the newly substituted language, still tracked the explanation given for the exemption in S.1666. Id., at 9; cf. S. Rept. No. 1219, supra, at 6-7. The only change made from the earlier Report was the omission of the sentence stating that "[a]ll factual material" would

have to be disclosed. Ibid. (emphasis added); cf. S. Rept. No. 1219, supra, at 7.

b. The House Report On S.1160.

The House of Representatives did not act on S.1160 until June 20, 1966. 112 Cong. Rec. 13661 (1966); Source Book, supra, at 8 n. 26. The House Report on the bill did not appear until May 9 of that year, after the bill had passed the Senate. H.R. Rept. No. 1497, supra. Its discussion of exemption 5 began familiarly enough:

"Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.'"

Id., at 10. To this, however, it added far more sweeping language:

"Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy."

Ibid. The Report concluded:

"S.1160 exempts from disclosure material 'which would not be available by law to a private party in litigation with the agency.' Thus, any internal memorandum which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public."

Ibid. With this legislative history in mind, we analyze the Board's contention here.

B. The Board's Investigative Statements Are Not "Memorandums" Reflecting A Deliberative Process Protected By The Exemption.

The Board asserts that its investigative statements are exempt from disclosure under exemption 5 for the reason that they are "normally privileged in the discovery context," N.L.R.B. v. Sears, Roebuck & Co., supra, 421 U.S. at 149; Renegotiation Board v. Grumman Aircraft Corp., 421 U.S. 168, 184 (1975), as "part of an attorney's work product." (Board Brief, at 21)

The Board has put the cart before the horse. It has ignored the substance of the exemption, and has construed a limitation on withholding as a grant of authority to withhold.

Exemption 5 consists of two clauses. The first clause specifically identifies types of agency records which are covered. They are "inter-agency or intra-agency memorandums or letters." The second clause restricts the scope of permissible withholding to those "memorandums or letters" which "would not be available by law to a party other than an agency in litigation with the agency." See, Environmental Protection Administration v. Mink,

supra, 410 U.S. 73, 85 (1973). 41 /

Here, the Board makes no effort to demonstrate that its investigative statements are "memorandums" within the meaning of Exemption 5. We think it cannot. The statements are devoid of that deliberative element which Congress sought to protect. In Environmental Protection Agency v. Mink, supra, the Supreme Court stated:

"Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy making processes, on the one hand, and purely factual, investigative matters on the other."

410 U.S. at 90 (citations omitted). The District Court properly recognized that this factual/deliberative dichotomy "is firmly rooted in the legislative history and policy of the Freedom of Information Act." (A. 70). The Congressional Reports repeatedly express that the purpose of the exemption is to permit the frank discussion of legal or policy matters by protecting their confidentiality. S. Rept. No. 1219, supra, at 6-7, 14; S. Rept. No. 813, supra, at 9; see also, H.R. Rept. No. 1497, supra, at 10.

41 / The Court stated the exemption covers:

"'inter-agency or intra-agency' memoranda or 'letters' that [are] used in the decision-making processes of the Executive Branch. By its terms, however, Exemption 5 creates an exemption for such documents only insofar as they 'would not be available by law to a party... in litigation with the agency.'" Ibid (emphasis added).

In the context of Board proceedings, these are not documents which, for example, "will inexorably contain the General Counsel's theory of the case and may communicate to the Regional Director some litigation strategy or settlement advice." N.L.R.B. v. Sears Roebuck & Co., supra, 421 U.S. at 159-160. Rather, they deal with "purely factual, investigative matters...." Environmental Protection Administration v. Mink, supra.

The foregoing leads to the conclusion that Board statements are not "memorandums" within the meaning of exemption 5. They do not summarize facts; they do not evaluate facts; they do not contain recommendations for agency action based upon facts. This is evident from the Board's own guidelines (issued by the General Counsel) for the conduct of investigations.

The Board agent investigating an unfair labor practice charge is instructed to "clearly convey that he is entirely neutral and merely seeks the truth"; "that the information [he receives] would be used [by the Board] in ascertaining the total picture...." N.L.R.B. Casehandling Manual (Vol. I, Unfair Labor Practice Proceedings), §10058.4 (1975) (emphasis added). He is further enjoined "to exhaust all lines of pertinent inquiry, whether or not they are in the control of, or suggested by, the charging party." Id., at §10056.3 (emphasis added).

In brief, he is to "take all investigative steps, short of 'fishing,' in areas calculated to bring results." Ibid. Former Regional Director Sidney Danielson recently described this process in an affidavit executed in another F.O.I.A. case pending in the Southern District of New York: 42 /

"[The] charge was duly investigated by employees on my staff pursuant to normal procedures whereby witnesses were interviewed and asked to give statements regarding the factual matters alleged in the charge. Generally such witnesses are interviewed separately outside the presence of the opponents. 42a/ It is not the function of the regional staff of the Board at the investigative stage to advocate the side of one party or another. Its function is simply to make a fair, impartial and complete investigation of the facts." (Emphasis added). 43 /

Accordingly, we do not agree that Board statements are "memorandums" within exemption 5. They do not partake of the deliberative quality associated with those documents. Environmental Protection Association v. Mink, supra.

42/ United Press International, Inc. v. N.L.R.B., 75-Civ.-6350 (J.W.C.).

42a/ See, N.L.R.B. Casehandling Manual, supra, at §10058. 2 ("Wherever possible, witnesses should be interviewed individually and outside the presence of representatives of the party offering them.")

43/ Affidavit In Opposition To Motion For Preliminary Injunction, dated December 30, 1975, at 1-2. The plaintiff in United Press International also seeks copies of the Board's investigative statements in connection with agency proceedings wherein it is charged with an unlawful refusal to bargain.

For these reasons, the Board's argument must fall. Since the statements are not "memorandums," the exemption never attaches.

C. The "Attorney's Work Product" Privilege Of Exemption 5 Does Not Expand The Scope Of Withholding Beyond That Afforded For Deliberative Memorandums.

The Board rests its claim for withholding on the second clause of exemption 5, which limits the scope of protection afforded to certain "memorandums and letters." It suggests that this clause broadens the exemption by inclusion of the attorney work product privilege, without regard to the non-deliberative nature of the documents sought to be withheld (Board Brief, at 21). We think the Board is wrong; the decision in Sears, Roebuck, supra, may not be read so broadly.

We observed earlier that, as proposed in 1964, there would have been no apparent exclusion for any factual materials under this exemption. S. Rept. No. 1219, supra, at 7, 14. In colloquy between Senators Humphrey and Long, however, it developed that the exemption was not so rigid as had been suggested. 110 Cong. Rec. 17667-17668, supra. According to Senator Long, it contemplated normal privileges dealing with: (1) work product and other memoranda, (2) summarizing facts, used as a basis for recommendations for agency action, (3) if those facts were otherwise available to the public. Id., at 17667-8.

To clarify the exemption, and to avoid the troubling task of identifying which "matters" in each case would have to be disclosed, the Senate substituted a new second clause similar to that found in the present exemption. S. Rept. No. 813, supra, at 1. While Congress explicitly stated that "the working papers of the agency attorney..." would be protected, id., at 2, protection was afforded for the abiding purpose of safeguarding agency deliberative processes. Id., at 9. The Senate's 1965 Report repeated almost verbatim the explanation contained in its earlier Report, despite the new language of the second clause. Ibid. Congress still intended to protect the "frank discussion of legal or policy matters in writing.. [from] public scrutiny," affording an exemption "as narrowly as consistent with efficient Government operation." Ibid.; cf. S.Rept. No. 1219, supra, at 6,8-9.

The amendment to the second clause of exemption 5 thus did not sever the provision from its roots in the protection of agency decision-making processes. As one commentator observed:

While the change in exemption (5) to the discovery standard broadened the exemption, there is no evidence that it was intended to discard the fact-policy distinction. Rather, the new criterion was apparently invoked only to assure non-disclosure of documents

when facts and policy are inextricably intertwined." 44/

This view is consistent with the discussion of the development of the exemption in Environmental Protection Administration v. Mink, supra, 410 U.S. at 89-91. 45/

The agencies were concerned that "[d]ocuments dealing with mixed questions of fact, law, and policy would inevitably, under the proposed exemption, become available to public." Id., at 90 and n.8. The N.L.R.B. shared this concern. By limiting the exemption to memorandums or letters dealing "solely with matters of law or policy," the Board complained:

"[A]n agency would...be required to make available virtually all of its internal documents, since most of them would deal to some extent with facts. This would include internal staff memorandums containing advice and recommendations relative to pending cases, working papers, tentative draft decisions, etc. All of these documents tend to reveal the mental processes of decision makers and their staffs at arriving at determinations in specific cases and are entitled to be privileged against disclosure. See Morgan v. U.S., [313 U.S. 409], and Kaiser Aluminum Co. v. U.S., [157 F. Supp. 939 (Ct. Cl.)]. In sum, if internal reports are to be worth anything, they must be based on facts rather than abstractions, and they must be free expressions of those who prepared them and not something 'cleared for publication.'

* * * " 46/

44/Katz, "The Games Bureaucrats Play: Hide and Seek Under The Freedom of Information Act," 48 TEX. L. REV. 1261, 1273 (1970) (footnotes omitted); reprinted in Source Book, supra, at 362.

45/See also, N.L.R.B. v. Sears, Roebuck & Co., supra, 421 U.S. at 150-155.

46/Hearings on S.1160 Before the Subcomm. on Admin. Pract. & Proc. of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess., at 486, 490 (1965) (Letter from William Feldsman, Solicitor, N.L.R.B., to Senator Eastland, Chairman, Senate Committee on the Judiciary, May 11, 1965).

The Board proposed that the exemption be broadened to include "interagency or intra-agency memorandums, letters, or other papers," Ibid. (emphasis added). Congress rejected this proposal. It refused to expand the coverage of the exemption to include "other papers." Instead, it qualified the same "memorandums and letters" language by applying the discovery standard. S. Rept. No. 813, supra, at 1, 2. The Supreme Court nevertheless recognized that this change did not

"embrace an equally wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy or opinion."

Environmental Protection Administration v. Mink, supra, 410 U.S. at 91 (emphasis added); see also, 110 Cong. Rec. 17667-8 (Remarks of Senator Long), supra. Only where this material was "inextricably without compromise of the deliberative process," or represented "a summary of factual material that is part of the deliberative process," though the facts themselves were elsewhere on the public record, could such material be withheld. Washington Research Project, Inc. v. Dep't. of H.E.W., 504 F.2d 238, 249 (D.C. Cir. 1974), cert. denied, 95 S. Ct. 1951 (1975); Montrose Chem. Corp. of California v. Train, 491 F.2d 63, 68, 71 (D.C. Cir. 1974) (a "winnow[ing] down [of] the evidence").

In concluding that "Congress had the attorney's work product specifically in mind when it adopted Exemption 5," N.L.R.B. v. Sears, Roebuck & Co., supra, 421 U.S. at 154, the Supreme Court relied on the explanation in S. Rept. No. 813, supra, stating that the exemption "would include the working papers of the agency attorney." Id., at 2. This reference, in itself, lends little to the Board's argument for protection of non-deliberative materials.

In the legislative history and caselaw, the phrase "working papers" appears in the context of "'internal working papers in which opinions are expressed and policies formulated and recommended.'" International Paper Co. v. Federal Power Comm., 438 F.2d 1349, 1359 (2d Cir. 1971), citing Ackerley v. Ley, 420 F.2d 1336 (D.C. Cir. 1969), and Consumers Union of United States v. Veterans Administration, 301 F. Supp. 796 (S.D. N.Y. 1969), app. dismissed as moot, 436 F.2d 1363 (2d Cir. 1971). 47/ See also, Environmental Protection Administration v. Mink, supra, 410 U.S. at 90-91 n. 18 (Statement of Federal Aviation Administration)46/ The reference to agency attorneys in the Senate Report simply narrows the focus on internal working papers containing

47/ Accord, Long v. U. S. Internal Revenue Service, 349 F.Supp. 871, 873-874 (W.D. Wash. 1972).

48/ The 1972 House Report viewed critically the Government's refusal to provide affirmative action plan information on the employment of women in government, based on exemption 5, noting, "The term 'working documents' was used in connection with (b) (5), a term that is not even in the language of the exemption subsection of the Act." H.R. Report No. 92-1419, supra, at 40 n. 81.(emphasis added).

opinions, policy matters or recommendations pertaining to government litigation, rather than to broader agency concerns. The deliberative quality remains central in Congress' thinking.^{49/} Indeed, all the Supreme Court held in N.L.R.B. v. Sears, Roebuck & Co., supra, was that:

"[The attorney work product rule] clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorneys theory of the case and his litigation strategy."

Id., at 154.^{50/} It is equally clear we are not dealing with such memoranda here.

D. Board Statements Are Not Within The Work Product Privilege Since They Are Not Materials Prepared In Contemplation Of Litigation.

To address the Board's contention that non-deliberative factual statements may come within the work product rule, it is necessary to analyze the rule in light of Hickman v. Taylor, 329 U.S. 495 (1947). A careful reading of that decision, reveals that the Court sought to protect the deliberative processes of an attorney in the preparation of a case and the results of work he performed in connection therewith. Id., at 510-514. The Court stated:

^{49/} The sweeping language in the House Report, supra, p. 50, is susceptible to a more liberal interpretation. H.R. Rept. No. 1497, supra, at 10. That Report, however, has been criticized by commentators, the courts, and Congress itself, as not being faithful to the language or intent of the F.O.I.A. See, K. Davis, "The Information Act: A Preliminary Analysis," 34 U. CHI. L. REV. 761, 763 (1967); Getman v. N.L.R.B., 450 F.2d 670, 673 n. 8 (D.C. Cir. 1971); Hawkes v. Internal Revenue Service, 467 F. 2d 787, 794 (6th Cir. 1972); Consumers Union of United States v. Veterans Administration, 301 F. Supp 796, 801 (SDNY 1969); cf. Rose v. Dep't. of the Air Force, 495 F.2d 261, 265 (2d Cir. 1974), appeal pending; "Discussion of the Legislative History of the Freedom of Information Act," Source Book, supra, at 8-9. Significantly, the Supreme Court did not rely on the broad House language in either Environmental Protection Administration v. Mink, supra 410 U.S. at 85-91, or NLRB v. Sears, Roebuck & Co., supra 421 U.S. at 154-155.

^{50/} The cases cited by the Court, id., at 154-155, emphasize this deliberative aspect. The Court declined to define the rule's "outer boundaries". Ibid.

"Proper preparation of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. * * * This work is reflected, of course, in interviews, statements, memorandas, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed by the Circuit Court in this case as the 'work product of the lawyer.'"

Id., at 511. 51 / Hickman v. Taylor, of course, dealt only with the work performed and materials gathered by an attorney. Thus, it is not relevant to Board procedures. When a charge is filed for investigation, it is assigned to a Board agent whose title is "Field Examiner." The Board's Case Handling Manual states: "After a case has been docketed for investigation, it is assigned to a Board agent." Id., at §10022. The regulations establishing N.L.R.B. Organization and Functions, 52 / further provide:

"The field examiners in each of the regional offices are directly responsible to the Regional Director and work under his direction. Essentially, they...investigate charges of unfair labor practices under Section 8 of the Act, have access to and the right to copy evidence, administer oaths and affirmations, examine witnesses and receive evidence..."

29 C.F.R. §203.4(b). Most unfair labor practice charges are dismissed or settled during the investigative stage (see p. 65, infra). Where, however, the Regional Director decides to issue a complaint, he then transmits the case file to a trial attorney who will conduct the liti-

51 / Exemption 5, we note, only refers to the correspondence ("letters") and memoranda ("memorandums") contained in this listing. The omission of the other types of documents by Congress cannot be construed as mere inadvertence. This omission further suggests that "statements" were not intended to be covered by exemption 5.

52 / 32 Fed. Reg. 9588, as amended by, 37 Fed. Reg. 15956.

gation. This procedure is described in the case

as follows:

"After a decision has been made that a complaint should issue, the case becomes the responsibility of the attorney to whom it is assigned (herein called the trial attorney)."

Id., at §10250. An understanding of this procedure is essential in determining whether or not factual affidavits obtained by Board agents during an investigation constitute privileged "material prepared for litigation." Cf. N.L.R.B. v. Sears, Roebuck & Co., supra, 421 U.S. at 160. 53 /

In Abel Investment Company v. United States, 53 F.R.D. 485 (D. Neb., 1971), the court was faced with a situation analogous to that in the instant matter. In the Abel case, the plaintiff sued for recovery of erroneously assessed taxes and sought production of the revenue agent's report, worksheets, supporting memoranda, records of interviews between the agent and others, and any and all memoranda of the agent's supervisors concerning the report. Id., at 487.

53 / The Court stated: "Since Memoranda will also have been prepared in contemplation of the upcoming litigation, they fall squarely within exemption 5's protection of an attorney's work product." Ibid. Sears, Roebuck, as noted, only dealt with deliberative materials prepared by attorneys.

"Material prepared for litigation" historically is a distinct privilege from the "attorney work product" privilege, cf., F.R. Civ. P. Rule 26(b)(3)(1970) and Advisory Committee Notes of 1970 ("Subdivision (b)(3) - Trial Preparation: Material"; "Basic Standard"; "Treatment of Lawyers: Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation"), reprinted in Moore's Fed. Prac. Rules Pamphlet, at pp. 624-629. Assuming, however, that the "attorney work product privilege" may be extended to include "material prepared for litigation," for the reasons discussed next, we do not believe the statements in this case constitute such material.

The Government objected to production on the basis that the documents were material prepared for litigation, and it argued that preparation for litigation began with the agent's investigation. The court rejected this argument. For reasons also applicable in the present case, the court stated that the documents were not prepared in anticipation of litigation: (1) the reports were routinely prepared in every case prior to any law suit, (2) relatively few investigations resulted in suit, (3) the documents were not prepared at the direction of an attorney who would actually try the case if litigation should develop, (4) the documents were not designed to be adversary in nature, and (5) the documents, in all probability, did not fix the government's theory of the case to be used at trial, since trial counsel should set the defense from all available facts and theories. *Id.*, at 489.

In ordering the Government to produce the documents the court concluded:

"To some extent the government seems to be taking the position that because continuity can be shown from audit to litigation, in that each report is submitted to the person who must make the next determination in a process which may lead to trial, any report or document prepared by any link in the chain is prepared in

anticipation of litigation. If this court were to so hold, it would indeed put the government in a position markedly advantageous to that of a private litigant. I think that any government agency whose determinations might lead to litigation could show the same continuity, as all serve the same master; but to hold that any intra-agency or inter-agency report which eventually could be relayed to the attorney who must try the case for the government is a report or document prepared in anticipation of litigation would be effectively to shield all government reports. This is, I think, clearly contrary to the intent of Rule 26."

53 F.R.D. at 490 (emphasis added). 54 /

54 Similarly, in *Peterson v. United States*, 52 F.R.D. 317, 320-321 (S.D. Ill. 1971), the district court held:

"...Generally, it is the court's belief that IRS appellate conferee reports and IRS field agent reports are not prepared in anticipation of litigation or for trial. Presumably they are prepared in the assessment and review process and, if they be held to be in anticipation of litigation, it is hard to see what would not be. Litigation cannot be anticipated in every such case when relatively few result in litigation. Since no showing to the contrary has been made or offered, it is this court's finding that the contents of the documents sought to be discovered by the plaintiffs through Interrogatories Nos. 6 and 8 are not protected from discovery by rule 26(b)(3)."

Such reasoning is controlling here. (1) Investigative affidavits are routinely prepared in every case (or nearly every case) prior to the issuance of a Board complaint. N.L.R.B. Statements of Procedure, Series 8, as amended, 29 C.F.R. §101.4; N.L.R.B. Casehandling Manual, supra, §§10040.2, 10058.2, 10058.5.

(2) Relatively few investigations result in actual litigation. In FY 1974, a total of 17,307 unfair labor practice cases involving employer respondents were closed. Of these, 23.6% were closed by informal settlement of the parties prior to the opening of the hearing (17.3 percent before issuance of a complaint). An additional 36.6% were withdrawn prior to hearing (35.7% before issuance of a complaint). Still another 31.9% were dismissed prior to hearing (31.7% before issuance of complaint). Thus more than 92% of all charges against employers never reached hearing, and almost 85% were disposed of prior to issuance of complaint. 55/ Thus the likelihood of litigation is small in any case in which an investigation is commenced.

(3) The statements were not prepared at the direction of an attorney who would actually try the case if litigation should develop. N.L.R.B. Statements of Procedure, supra, 29 C.F.R. §§101.8, 101.10; N.L.R.B. Organizations and Functions, supra, pp. 61-62.

55/39 ANN.REPT. OF THE N.L.R.B., at 210-212 (Table 7. - Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1974; Table 8. - Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1974) (1974). See also, Hearings on S. 1160, supra, at 491.

(4) and (5). The Board's investigative statements are not designed to be adversarial in nature, supra, pp. 53-54, and therefore do not fix the theory of the case at trial.

The statements here were not prepared "with an eye toward the anticipated litigation." Hickman v. Taylor, supra, 329 U.S. at 498. To so construe them would distort the meaning of the "attorney work product" privilege, 56/ and unduly expand the coverage of F.O.I.A. exemption 5; 57/ for as we discussed supra, Point I Congress in 1967 enacted a broad exemption expressly designed to protect Board affidavits. It would not have done so had it believed they were already subject to withholding under exemption 5.

These conclusions were apparently shared by General Counsel of the Board, prior to this litigation. In the Guidelines of N.L.R.B. General Counsel For Regional Processing Of Requests

56/Indeed, it is ironic for the Board to rely on a privilege from discovery on the one hand, while rejecting discovery on its proceedings on the other (A.98). It has been suggested that the absence of discovery techniques in agency proceedings bars the agency from asserting the privilege of attorney work product in district court litigation related to those proceedings. Cf. In re Natta, 410 F.2d 187, 192 (3d Cir. 1969), distinguishing, Zenith Radio Corp. v. R.C.A., 121 F. Supp. 792, 795 (D. Del. 1954) (Patent Office Interference Proceedings). (Natta is cited by the Supreme Court in N.L.R.B. v. Sears, Roebuck & Co., supra, 421 U.S. at 154). Hickman v. Taylor, supra, itself suggests that the availability of discovery is a predicate for invoking the privilege. 329 U.S. at 508-509

57/The exemptions are to be narrowly construed. Rose v. Dep't of the Air Force, 495 F.2d 261 (2d Cir. 1974), certiorari granted, decision pending in Supreme Court (No. 74-489); Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir.), cert. denied, 415 U.S. 977 (1974)

Under Freedom Of Information Act, dated July 8, 1975, 58/ the Agency's chief of litigation reviewed the law under Environmental Protection Administration v. Mink, supra, and N.L.R.B. v. Sears, Roebuck & Co., supra. Id., at C-6. He then discussed "The Application of Exemption 5 to Documents of This Agency." Ibid. In addition to the advice and appeals memoranda discussed in Sears, Roebuck, General Counsel stated:

"Other material which would come within exemption 5 as defined by Sears would include final investigation reports, 59/ legal research memoranda prepared by Board agents during the investigation of a case, Board agents' case notes and memoranda to the file or to supervisors, requests for advice, Regional Office comments on appeal, drafts of decisions and directions of elections or decisions and orders, recommendations for approval of election agreements, and recommendations to issue notice of hearing."

Ibid. The General Counsel added:

58 /Reprinted in White Collar Report (Bureau of National Affairs, Inc.), No. 957, August 8, 1975, at p. C-1.

59 /But see, N.L.R.B. v. Sears, Roebuck & Co., supra, 421 U.S. at 161 n. 27: "It should be noted that the documents incorporated by reference [in non-exempt advice and appeals memoranda] are in the main factual documents which are probably not entitled to Exemption 5 treatment in the first place. EPA v. Mink, 410 U.S., at 87-93." (Emphasis added).

"This is not intended as an exhaustive list. There may well be other memoranda or letters reflecting the frank discussion necessary to the deliberative process which exemption 5 protects."

Id. at C-7. Thus, although General Counsel lists many specific examples of Board documents assertedly within Exemption 5, he fails to mention investigative statements. And even as to other documents not specifically mentioned, he states that the exemption protects only those "memoranda or letters reflecting the frank discussion necessary to the deliberative process." Furthermore, in his Appendix of "Responses To FOIA Requests," General Counsel does not recommend invoking exemption 5 when a request for witness statements is received; he recommends refusing the request only on the bases of exemptions 7(A), (C) and (D). Id. at C-11 ("Table of Contents"), C-14 (#7A-3) and C-16 (#7C-3, #7D-3). Here, General Counsel's position appears to be at variance with one taken prior to this suit.

Finally, we note that District Courts which have considered the applicability of exemption 5 to the Board's investigative statements subsequent to the issuance of the October 10 decision in this case have rejected the Board's argument. In Deering Milliken, Inc. v. Nash, ____ F. Supp. ____, 90 L.R.R.M. 3138 (D.S.C., No. 75-864, decided November 12, 1975), the Court stated with respect to most of the documents there in dispute:

"The great majority of the documents consist primarily of factual material for which the asserted privilege is totally inappropriate. In some cases the documents withheld are so clearly not entitled to Exemption 5 status that the very assertion of the privilege constitutes abuse of its existence."

Id., at 3146. 60/ Similarly, in The Cessna Aircraft Co. v. N.L.R.B., F. Supp. , 90 L.R.R.M. 3339, 3340 (D. Kan., No. 75-111-C6, decided December 2, 1975), the Court rejected a b(5) argument by the Board, observing, "The statements contain factual material, and are not a part of any inter-agency memorandums or letters." And in Climax Molybdenum Co. v. N.L.R.B., F. Supp. , 90 L.R.R.M. 3126 (D. Colo., Nos. 75-M-977,1029, decided November 14, 1975), relied upon by the Board (Brief, at 10,13) the Court also found, "because the material sought is factual material which comes from sources outside the N.L.R.B., it cannot be considered to be within the scope of exemption 5," citing E.P.A. v. Mink, supra, and Schwartz v. I.R.S., 511 F.2d 1303, 1305 (D.C. Cir. 1975). Id. at 3127.

For the foregoing reasons, the Board has not demonstrated that the statements sought by Title Guarantee are exempt as "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency" 5 U.S.C. §552(b)(5). The District Court was correct in rejecting the claim for exemption.

60/In Deering Milliken, the company sought affidavits and other documents bearing upon the question of back-pay liability arising from an unlawful plant closing years before.

The Court relied on the Fourth Circuit's decision in Ethyl Corporation v. E.P.A., 478 F.2d 47, 49-50 (4th Cir. 1973), which also followed the deliberative/policy-making - factual/investigative matters distinction employed by Judge Gagliardi here. 90 L.R.R.M. at 3145-3146. It noted that the Fourth Circuit recently reaffirmed these views in Moore-McCormack Lines Inc. v. I.T.O. Corp. of Baltimore, 508 F.2d 945 (4th Cir. 1974). Id., at 3146 n. 28.

POINT III

THE DISTRICT COURT PROPERLY
REQUIRED THE BOARD TO PRODUCE
THE STATEMENTS FORTHWITH OR
TO STAY ITS HEARING PENDING APPEAL

After deciding that the Board's statements were not exempt from disclosure under the F.O.I.A., the District Court directed the Board to furnish the statements forthwith, or to stay its administrative hearing (A. 76). The Court concluded that Title Guarantee would be irreparably harmed if it had to defend an unfair labor practice proceeding without having the statements prior to the hearing. (Ibid.) In denying the Board's motion for a stay pending appeal, the Court dwelt principally on its reasons for enjoining the hearing, and rejecting the Board's arguments (A. 97-99). They are the same arguments raised here.

A. The Supreme Court's Decision In Bannercraft Supports The District Court's Injunction In The Instant Matter

The District Court properly read Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1 (1974), as holding that a district court did have jurisdiction to enjoin agency proceedings. Id., at 20 (A. 65-67; A.97-98). 61/ The District Court properly concluded, that "the nature of an unfair labor practice proceeding is such that [Title Guarantee] will be

61/ The Supreme Court held only that a court should not exercise this authority in renegotiation proceedings. Ibid.

irreparably harmed if the material is not disclosed prior to those hearings." (A. 67; A. 97-98). It correctly distinguished renegotiation proceedings from N.L.R.B. adjudicative proceedings. (A. 98).

In Bannercraft, the Supreme Court noted:

"[Re]negotiation is a bargaining process, with give and take, and with stress upon and use of the strengths of one's own position and the weaknesses of the position of the other party. It is in a process such as this, where the phrase 'leading from strength' has been so effectively transferred in practical application from the card table to the world of commerce. It is part of the warp and woof of production."

94 S.Ct. at 1039. No extended discussion is required to recognize the substantial differences between renegotiations and the N.L.R.B. proceedings under consideration here. N.L.R.B. complaint proceedings are intended to establish whether civil liability exists for alleged violations of the N.L.R.A. They are conducted as a trial before an administrative law judge, who makes findings of fact, conclusions of law, and issues a recommended order subject to Board review. 29 C.F.R. §§102.9-102.51. They are governed by the Administrative Procedure Act, 5 U.S.C. §551, et seq. Unlike Renegotiation Board proceedings, in N.L.R.B. proceedings, there is little room for a sporting theory of justice. As in any other adjudication, the object is to "make a trial less of a game of blind man's bluff

and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." United States v. Proctor & Gamble Co., 356 U.S. 677 (1958). Such is the reasoning behind the pretrial discovery provisions of the Federal Rules of Civil Procedure. Ibid.;4 Moore's Federal Practice, ¶ 26.02 [1] (3d ed. 1974).

The disclosure sought here would further such ends. Board affidavits are taken not simply to support a charging party's allegations, but to develop a complete record upon which the Board tries to determine whether those allegations are true. See, Point II supra, at pp. 53-54. Thus, it may fairly be anticipated that the statements sought would contain information both supportive and against interest of the charging party. The F.O.I.A. provides Title Guarantee, as a member of the public, the right to review such affidavits, whether or not the affiant is called as a witness by General Counsel in this particular administrative proceeding. See, N.L.R.B. v. Sears, Roebuck & Co., supra, 421 U.S. at 143 n. 10; The Cessna Aircraft Co. v. N.L.R.B., ____ F. Supp. ____, 90 L.R.R.M. 2376, 2378 (D. Kan., August 21, 1975). 62 /

62/In the instant matter, moreover, the Acting Chief Administrative Law Judge ruled that having exhausted its F.O.I.A. administrative remedies to obtain the statements, Title Guarantee's recourse lay in the courts and not in agency unfair labor practice proceedings (A.101-102; A.97,100). See, Mercy College, 219 N.L.R.B. No. 5, 90 L.R.R.M. 1179, 1180 (1975).

The Supreme Court in Bannercraft, supra, also stressed the nature of review available from the agency proceedings there in issue. It observed:

"There is no limitation or denial of the contractor's normal litigation rights when the renegotiation process is at end. The contractor may institute its de novo proceeding in the Court of Claims, unfettered by any prejudice from the agency proceeding and free from any claim that the Board's determination is supported by substantial evidence. There the usual rights of discovery are available. And there the parties are not bound by a prior determination made at any level of the Renegotiation Board structure 50 U.S.C. App. §1218. That proceeding is the judicial remedy at law provided by the Renegotiation Act and is adequate protection against injury."

94 S.Ct. at 1040 (emphasis added). Such de novo review is not available under the N.L.R.A., §10(e), 29 U.S.C. §160(e), as the District Court recognized. (A. 98). Indeed the scope of review that is available is quite restricted. As a general proposition, the Court of Appeals will consider only whether the Labor Board's decision and order are supported by substantial evidence. N.L.R.B. v. Universal Camera Co., 340 U.S. 474, 488 (1951). It is particularly difficult to overturn an administrative law judge's credibility findings, either before the Board, Standard Dry Wall Products, Inc., 91 N.L.R.B. 544, enforced, 188 F.2d 362 (3d Cir. 1951), or the Court of Appeals, N.L.R.B. v. Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952);

cf. N.L.R.B. v. Stark, supra, 90 L.R.A.M. at 3079. Even with respect to questions of law, the Supreme Court has suggested that appropriate weight should be given Board interpretations as the primary administrator of the labor relations law.

N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944); Medo Photo Supply Corp. v. N.L.R.B., 321 U.S. 678 (1944); N.L.R.B. v. Truett Mfg. Co., 351 U.S. 149 (1956) (remedies). Thus, the broad review permissible under the Renegotiation Act is unavailable under the N.L.R.A. 63/

In view of the distinctions between Labor Board and Renegotiation Board proceedings, and the above-quoted language in Bannercraft, it was entirely appropriate for the District Court to conclude that the Supreme Court's decision did not bar an injunction, and to give the Board the option of turning over the statements or halting its proceedings.

B. Title Guarantee Would Have Been Irreparably Harmed By A Denial Of The Injunction

The Board argues that the Company would not be seriously harmed by having to litigate in the unfair labor practice hearing without first obtaining the statements (Board Brief, at 22-24), because its Jencks Rule affords adequate discovery, and that the Board's administrative law judge can deal with any particular problem of surprise or prejudice that arises during the hearing. (Ibid.)

⁶³We disagree with the Board's analogy to Bannercraft that, "the decision of the [Board] does not impose any obligation on the parties until termination of further court proceedings...." (Board Brief, at 25). The National Labor Relations Act specifically states in §10(g) that "The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the Court, operate as a stay of the Board's order." 29 U.S.C. §160(g).

The Board's argument avoids the problem that the F.O.I.A. may afford not only earlier disclosure than under the Jencks Rule, but greater disclosure, as well. The Board's regulation, it will be recalled, applies only to the statement of a witness who has testified on behalf of General Counsel at an unfair labor practice hearing, and only to that portion of his pre-trial statement which relates to the subject matter as to which the witness has testified. 29 C.F.R. §102.118(b)(2).

In this case, there is no assurance that Title Guarantee would ever obtain production of any statement under this rule. At oral argument in the District Court, Board counsel stated frankly that the Region "ha[d] not yet determined what witnesses if any will be called because there is a strong possibility [it] may be granted summary judgment...." (A. 53 [Tr. 17]; see also, A. 54 [Tr. 18]). If no witnesses were called to testify, no statements would be produced. Yet, the statements would likely provide valuable insight into various issues which

may arise in the case, for instance, the charging party's view of the status of negotiations on the date of withdrawal of recognition and union support in the bargaining unit at that time.

As a respondent in an unfair labor practice proceeding, Title Guarantee does not enjoy the benefit of nonadjudicative administrative action in which any error may be remedied at plenary trial in District Court. Cf. Renegotiation Board v. Bannerkraft Clothing Co., supra. The formality and finality of the Board's proceeding are not lessened because its adjudication is "softened by a quasi." 64/ In the vast majority of Board cases, the issue is won or lost at the trial level. It is there that a litigant must prove his case and where impediments to his thorough preparation may in subtle, but very real ways, adversely affect the outcome. Decisions such as N.L.R.B. v. Interboro Contractors, Inc., 432 F.2d 854 (2d Cir. 1970), only serve to confirm this view. It is at the trial level, then, that the F.O.I.A. must be enforced, before the administrative momentum carries the case beyond the point where the harm can be undone. As the District Court stated:

"If the unfair labor [practice] proceeding continues and plaintiff does not prevail in that matter because of a lack of opportunity to adequately prepare, it is hardly likely that any judicial review would ever undo the harm."

64/Springer v. Government of the Philippine Islands, 277 U.S. 189, 210 (1928) (Holmes, J., dissenting).

(A. 97). We have little doubt but that were Title Guarantee to raise a procedural argument based on denial of pre-hearing disclosure on review of a Board Order, the Company would again be met with a Board claim that there is no prejudice in limiting disclosure to that afforded under its rules. See, e.g., N.L.R.B. v. Lizdale Knitting Mills, ____ F.2d ____, 90 L.R.R.M. 3341, 3342-43 (2d Cir., No. 74-2557 decided September 26, 1975). Title Guarantee should not "be drawn into this morass." See, The Cessna Aircraft Company v. N.L.R.B., supra, 90 L.R.R.M. at 3340. If the F.O.I.A. does not permit a litigant to show "need" as justification for disclosure, neither should it require him to demonstrate a due process violation in later agency proceedings to benefit from the prompt disclosure to which the F.O.I.A. entitles him. 65/

C. An Exhaustion Of Administrative Remedies Is Not Required In The Circumstances Of This Case.

There remains the question of Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), and other cases holding that Board proceedings should be permitted to run their course without judicial interference. The Board seems to suggest that Bannerkraft notwithstanding, the Freedom of Information Act was not intended to disturb the long-established national policy of permitting the Board exclusive control over its enforcement procedures. See, Climax Molybdenum Co. v. N.L.R.B., supra, 90 L.R.R.M. at 3127. We disagree.

65/While Title Guarantee would be materially harmed by the denial of the injunction against Board proceedings, the Board would not be harmed by the grant thereof. This Court has expedited the appeal in accordance with the F.O.I.A., 5 U.S.C. §552 a(4)(D), the Federal Rules of Appellate Procedure, and the rules of the Court. (See, A. 88).

The legislative history of the F.O.I.A. demonstrates that Congress did specifically consider the Board's affidavits in drafting its original legislation and incorporated the agency's Jencks Rule in the 1967 statute. See Point I, supra at pp. 8-9. Original exemption 7 tends to support the Board's view.

The 1974 amendments to exemption 7, however, must be construed as a conscious effort by Congress to override the "blanket exemption" authorized by the original provision, specifically with respect to the Labor Board affidavits. See, Point I, supra at 25-32. Indeed, the pertinent legislative history of the original Act was included in the Committee Print prepared by the Senate Committee on the Judiciary in connection with the drafting of the amendments, as "a basic source book for those members of Congress and the public wishing to learn about and to use the [Act]." 66/ If Congress intended to provide a right to disclosure of such materials prior to the time and greater than that authorized by the Board's Jencks Rule, then, in our opinion, it also must have intended to provide a remedy to compel such disclosure.

The legislative history of the recent amendments supports the view that Congress did so intend. Significantly, the only reference to Bannercraft, supra, in the Committee Reports on the amended legislation is contained in the Senate Report's discussion of a proposal for expedited appeals in F.O.I.A. cases. 67/

66/Source Book, supra at III (Letter of Transmittal from Senator Kennedy to Senator Eastland). The legislative history of S.1666 with respect to the Humphrey-Long amendment to exemption 7 is contained at pages 109-113.

67/The proposal was adopted and is contained in §552(a)(4)(D) of the amended Act. See, S. Conf. Rept. No. 93-1200, supra, at 8.

The Report states:

"It should be noted that expedition of F.O.I.A. cases on appeal as well as the trial level may well work to the advantage of the government. For the Supreme Court, although not applying its conclusion to the case before it, held that the F.O.I.A. confers jurisdiction on the courts to enjoin administrative proceedings pending a judicial determination of the applicability of the Act to documents involved in those proceedings. (Renegotiation Board v. Bannerkraft Clothing Co., 415 U.S. (1974.)) Thus additional delays may be avoided by expedition of judicial determinations in F.O.I.A. cases."

S. Rept. No. 93-854, supra, at 13 (1974) (emphasis added).

It therefore appears that Congress specifically contemplated suits wherein agency proceedings would be halted pending disposition of F.O.I.A. claims. It directed courts to expedite F.O.I.A. cases through the appeals stage, as well as at the trial level, so that "additional delays" in related agency proceedings would be avoided. Some delays were to be expected. In this connection it cited Bannerkraft approvingly for the proposition that a District Court had authority to, and would, enjoin administrative proceedings where necessary to enforce F.O.I.A. disclosure orders. 68/

In sum, Congress did depart from the customary policy with respect to non-interference in N.L.R.B. proceedings. Having granted a right under the F.O.I.A., it also provided a remedy. Moreover, as the District Court noted in the instant matter:

"Bannerkraft and all other cases cited by the parties and discussed herein deal with the question of preliminary injunction relief pending resolution of Freedom of Information [Act] claims. Here, this court has determined that plaintiff is entitled to

68 /The amendments to the F.O.I.A. demonstrate a Congressional intention not only to require disclosure, but to require disclosure timely to the purpose for which it is sought. See, S. Conf. Rept. No. 93-1200, supra, at 8 (Response to Complaints, Expedited Appeals), 9-10 (Administrative Deadlines).

summary judgment on the merits and the equitable considerations weigh commensurately more heavily in plaintiff's favor.

(A. 100 n. 3) 69 / Finally, it is to be remembered that the Company neither sought a stay, 70 / nor did the Court impose one. The Court simply provided the Board with an option which the Board exercised. The Board, instead, could have complied with the Court's disclosure order. In that case the administrative trial would have long since concluded.

An exhaustion of administrative remedies is not required where the administrative proceedings will not add to the eventual judicial determination. See, McKart v. United States, 395 U.S. 185 (1969). Such is the case here. The District Court has rendered a decision on the merits. We believe it is a correct one. Its mandate should not be eviscerated by a strategy calculated to avoid compliance.

69 / Sears, Roebuck & Co. v. N.L.R.B., 473 F.2d 91 (D.C. Cir.), cert. denied, 415 U.S. 950 (1974), the case upon which the Board placed primary reliance, is distinguishable for the additional reason that in Sears, the company was the charging party, and the Board issued a complaint at Sears' own request. (A. 67). Here, of course, Title Guarantee is a respondent in agency proceedings.

70 / In a letter to the Court, dated September 23, Title Guarantee emphasized that it sought expedited consideration of the F.O.I.A. case because it did not wish to interrupt Board proceedings. The letter stated, in part:

"Although the Company has requested an injunction halting the Board's proceedings until such time as the Court has had an opportunity to decide this case, and in the event of a decision requiring disclosure, the Company has had a reasonable opportunity to utilize the statements for preparation purposes, the Company, like the Board we are sure, would prefer to have a rapid determination in this case so that the Board's hearings could go forward without delay. We note that the F.O.I.A., itself, encourages such a result,*** [quoting the provisions of 5 U.S.C. §552(a)(4)(D)]."

This point was again made by the Company at oral argument in the District Court (A. 63 [Tr. 32]).

CONCLUSION

There is nothing inconsistent between the F.O.I.A. and the N.L.R.A. They are capable of coexistence. See, Administrator, F.A.A. v. Robertson, ____ U.S. ____, 43 L.W. 4833, 4837 (1975). The Court in Deering Milliken, Inc. v. Nash, supra, identified the cause of friction between the two, however, when it stated:

"This court makes no effort to conceal its disapproval of the NLRB's apparent policy of restricting discovery in all proceedings to the bare legal minimum regardless of the circumstances of the case. It is this frustrating and in some cases unjust policy which has led to a rash of FOIA Act suits against the NLRB and has compelled that agency to acquire the great familiarity with the FOI Act that it obviously has."

90 L.R.R.M. at 3149 (emphasis added). The F.O.I.A. will not permit the Board to ignore those "circumstances." Furthermore, where, as here, a litigant has gone to court prior to an administrative hearing and obtained an order directing disclosure under the Act, the Board should not be heard to complain because of delays ultimately caused by its own procedures.. It may "stand upon principle" if it desires, The Cessna Aircraft Company v. N.L.R.B., 90 L.R.R.M. at 3339, and continue to deny discovery in its proceedings, but it must be prepared to make sacrifices for that stand.

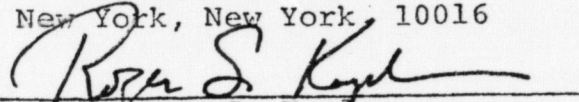
The Order of the District Court should be affirmed.

DATED: NEW YORK, NEW YORK
January 22, 1976

Respectfully submitted,

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